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Vol. I

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 635

MERCHANTS WAREHOUSE COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JAMES GALLAGHER, ET AL.

No. 636

MERCHANTS WAREHOUSE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JAMES GALLAGHER, ET AL.

No. 637

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WALTER A. BAILEY, ET AL., APPELLANTS,

vs.

MERCHANTS WAREHOUSE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, GROCERS' & IMPORTERS' EXCHANGE OF PHILADELPHIA

No. 638

THE PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WALTER A. BAILEY, ET AL.

No. 639

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vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WALTER A. BAILEY, ET AL.

(35,557, 35,558, 35,559, 35,560, 35,561, 35,562, 35,563, 35,564, 35,565)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 9, 1931

No. 640

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WALTER A. BAILEY, ET AL., APPELLANTS,

vs.

THE PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, GROCERS' & IMPORTERS' EXCHANGE OF PHILADELPHIA

No. 641

THE PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND REX & COMPANY, INC., ET AL.

No. 642

PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND REX & COMPANY, INC., ET AL.

No. 643

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND WALTER A. BAILEY, ET AL., APPELLANTS,

vs.

THE PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, GROCERS' & IMPORTERS' EXCHANGE OF PHILADELPHIA

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VOL. I

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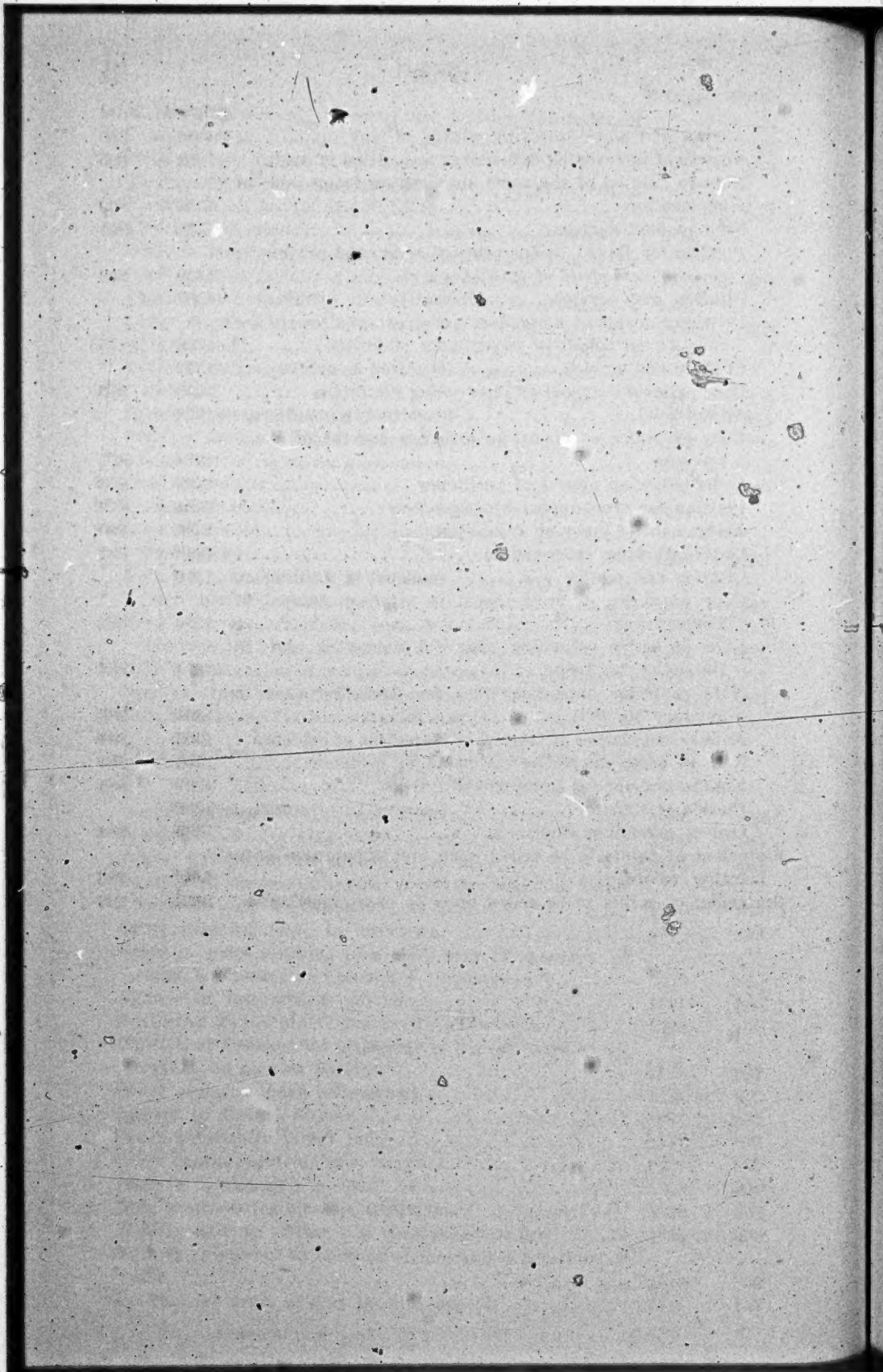

[fols. 1-3]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DECEMBER TERM, 1929

5781

THE MERCHANTS WAREHOUSE COMPANY, Plaintiff; Commercial Exchange of Philadelphia, Grocer's and Importers Exchange of Philadelphia, Philadelphia Board of Trade, Philadelphia Bourse, The Association of Manufacturers Representatives, Inc., Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, Defendants; James Gallagher, Northeastern Warehouse Co., Walter A. Bailey, Terminal Warehouse Company, Intervening Defendants

A. S. Olmsted, 2nd, Esq., W. A. Glasgow, Jr., Esq., M. Hampton Todd, Esq.
Saul, Ewing, Remick & Saul, Esqs.
Elmer B. Collins, Esq., J. Stanley Payne, Esq.
T. L. Reiniel, Esq., John J. Hickey, Esq.

DOCKET ENTRIES

February 14, 1930.—Petition to enjoin defendants from enforcing and to annul order of Interstate Commerce Commission of December 28, 1929, filed.

February 17, 1930.—Decree fixing February 21, 1930, for hearing application for temporary stay of operation of Order of Interstate Commerce Commission filed.

February 17, 1930.—Proof of service of copy of petition filed.

February 20, 1930.—Order of Court amending Decree of February 17, 1930 by substituting the name of Honorable O. B. Dickinson in place of Honorable Wm. H. Kirkpatrick filed.

February 21, 1930.—Motion to amend petition and decree allowing motion filed.

February 21, 1930.—Petition by James Gallagher, et al. for leave to intervene as defendants and Decree granting petition filed.

[fol. 4] February 21, 1930.—Decree granting temporary stay of order of Interstate Commerce Commission filed.

February 25, 1930.—Answer of Northeastern Warehouse Company et al., intervening defendants filed.

March 4, 1930.—Appearance of T. L. Reinel, Esq., for intervening defendants; filed.

March 6, 1930.—Answer of Interstate Commerce Comsion filed.

March 6, 1930.—Testimony filed.

March 8, 1930.—Petition by Commercial Exchange of Philadelphia et al. for leave to intervene as party plaintiffs and decree granting prayer of petition filed.

March 15, 1930.—Answer by United States of America filed.

March 26, 1930.—Argued.

March 27, 1930.—Decree amending decree of February 17, 1930, by substituting the name of Hon. Joseph Buffington in place of Hon. Victor B. Woolley, filed.

March 27, 1930.—Argument resumed.

March 28, 1930.—Argument concluded.

April 15, 1930.—Decree continuing temporary stay of order of Interstate Commerce Commission filed.

October 8, 1930.—Opinion, Thompson, J. (Dickinson, J. concurring, Buffington, J. dissenting) dismissing Petition of February 14, 1930 to enjoin defendants from enforcing order of Interstate Commerce Commission, filed.

November 5, 1930.—Petition for order staying enforcement of Order of Interstate Commerce Commision pending appeal filed.

November 5, 1930.—Opinion, Thompson, J. sur findings of fact and conclusions of law filed.

November 10, 1930.—Answer of intervening defendants to petition of Merchants Warehouse Company for order staying enforcement of Order of Interstate Commerce Commission pending appeal filed.

November 14, 1930.—Answer of Interstate Commerce Commission to petition for order staying enforcement of Order of Interstate Commerce Commission pending appeal filed.

November 17, 1930.—Answer of United States to petition for stay of order of Interstate Commerce Commission pending appeal filed.

November 19, 1930.—Exceptions by petitioner to findings of fact and conclusions of law filed.

November 19, 1930.—Argued sur settlement of decree and petition for appeal and supersedeas.

[fol. 5] November 19, 1930.—Final Decree dissolving temporary orders of February 21, 1930, and April 15, 1930, staying and suspending Order of Interstate Commerce Commission overruling plaintiffs exceptions to findings of fact and conclusions of law and dismissing petition to enjoin defendants from enforcing order of Interstate Commerce Commission of December 28, 1929, filed.

November 19, 1930.—Opinion (per curiam) granting order of supersedeas and allowing exceptions thereto filed.

November 19, 1930.—Petition for appeal, assignments of error, and prayer for reversal of decree of November 19, 1930, filed.

November 19, 1930.—Decree granting petition for appeal.

November 19, 1930.—Bond sur appeal in $2000, with American Surety Company of New York surety and Decree approving same filed.

November 19, 1930.—Citation allowed and issued.

November 19, 1930.—Citation returned—service accepted and filed.

December 17, 1930.—Decree extending time for docketing case in U. S. Supreme Court filed.

December 24, 1930.—Assignments of error by Intervening plaintiffs filed.

December 24, 1930.—Petition for Reversal by Intervening plaintiffs filed.

December 24, 1930.—Petition for appeal by Intervening plaintiffs filed.

December 24, 1930.—Order of Court granting appeal filed.

December 24, 1930.—Citation allowed and issued.

December 26, 1930.—Citation returned: "service accepted" and filed.

December 30, 1930.—Decree enlarging time in which to file record with Clerk of Supreme Court of United States to January 10, 1931, filed.

January 6, 1931.—Copy of notice of appeal to United States Supreme Court of United States forwarded to Attorney General of the State of Pennsylvania, filed.

January 7, 1931.—Order consolidating this cause with Nos. 5789 and 5791 for purpose of trial, filed

January 7, 1931.—Statement of evidence in Narrative form, Stipulation of Counsel, and Order approving same filed.

January 7, 1931.—Petition for Cross-Appeal by Respondents filed.

January 7, 1931.—Assignment of Error on Cross-Appeal, filed.

January 7, 1931.—Order allowing Cross-Appeal, filed.

[fol. 6] January 7, 1931.—Citation on Cross-Appeal allowed and issued.

January 7, 1931.—Citation returned "service accepted" and filed.

January 7, 1931.—Copy of Notice to Attorney General of Pennsylvania of Cross-Appeal, and proof of service, filed.

January 7, 1931.—Præcipe for Transcript of Record sur Appeals, filed.

[fols. 7 & 8] IN UNITED STATES DISTRICT COURT

In Equity. No. 5781

[Title omitted]

AMENDED PETITION—Filed Feb. 14, 1930

1. The petitioner above named brings this its petition against the defendants above named, for the purpose of enjoining, setting aside and annulling as hereinafter prayed, an order entered by the Interstate Commerce Commission hereinafter called the Commission, by Division 3 thereof, on the 28th day of December, 1929, in a proceeding then pending before the Commission, namely, Interstate Commerce Commission Docket No. 20968, which was instituted by a complaint in which James Gallagher, Northeastern Warehouse Company, Walter A. Bailey and Terminal [fol. 9] Warehouse Company were complainants, The

Pennsylvania Railroad Company was defendant, and your petitioner was an intervenor.

2. Petitioner is a corporation duly organized and existing under the laws of Pennsylvania. It is engaged in the business of operating warehouses. Its principal office and all of its warehouses are in the City of Philadelphia in the said Eastern District of Pennsylvania.

3. United States of America is a necessary party defendant in a proceeding to enjoin, set aside and annul an order of the Interstate Commerce Commission under the provisions of the District Court Jurisdiction Act, approved October 22, 1913, (38 Stat. L., 219), U. S. Code, Title 28, Section 41, Sub Division 28, Sections 43 to 48. This suit is brought under the provisions of said act and also under the general equity jurisdiction of this Court.

4. The Interstate Commerce Commission in an administrative tribunal created by the Interstate Commerce Act, approved February 4, 1887, (24 Stat. L., 379), as amended, including amendments to said Act contained in the Transportation Act of 1920, approved February 28, 1920 (41 Stat. L., 456), under which said acts it assumed to proceed in rendering its said order on December 28, 1929, in the proceeding aforesaid.

5. Under its tariffs duly on file with the Interstate Commerce Commission, the Pennsylvania Railroad Company (hereinafter termed the Pennsylvania) undertakes to load and unload freight consigned from and to the City of Philadelphia at certain stations designated in the tariffs afore- [fol. 10] said at Philadelphia. Included among the stations so designated by the Pennsylvania in its tariffs are eleven stations owned and operated by the Pennsylvania where this service is performed by employees of the Pennsylvania, five stations owned by the Pennsylvania and operated by your petitioner where this service is performed by the petitioner, and seven stations, owned and operated by the petitioner where this service is performed by the petitioner.

6. In and by its said tariffs aforesaid, the Pennsylvania undertakes to load and unload carload package freight at the terminal stations in the City of Philadelphia referred to in paragraph 5 and to perform certain other services inci-

dent to the transportation of carload package freight at said designated terminal stations. In and by said tariffs, forty-eight hours free storage is allowed by the Pennsylvania to consignees after the arrival of carload freight at any one of the designated stations and the Pennsylvania is obliged by the provisions of its said tariffs and as a part of its transportation duties under the Interstate Commerce Act to store and protect such carload freight during said period of free time.

7. The petitioner and the Pennsylvania Railroad have entered into a series of agreements covering the operations above mentioned. Five of these are leases of the property owned by the Pennsylvania Railroad to the petitioner as well as contracts under which the stations are operated. All of them provide that the petitioner shall perform certain services for the Pennsylvania Railroad Company, notably:

(a) To accord to traffic passing over the lines of the Pennsylvania Railroad system, preference in the facilities [fol. 11] furnished by the petitioner over traffic passing over other lines.

(b) To load and unload and handle freight received by the petitioner to be shipped over the lines of the Railroad Company or received by the petitioner from the Railroad Company for delivery to consignees. In the case of incoming freight, petitioner is also to notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of freight and other charges upon inbound freight. The Warehouse Company has furnished a bond, conditioned for the prompt payment of the said charges.

(d) To indemnify and hold harmless the Railroad Company from all damage to or loss of freight in the custody or control of the petitioner and to maintain fire insurance on all such freight, adequate to cover the Railroad's liability.

(e) To notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as petitioner holds the freight for account of the Railroad

Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To indemnify the Railroad Company against liability on account of any acts or omissions of the petitioner and on account of receipts for merchandise issued by petitioner.

(g) To keep the Warehouse in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

[fol. 12] 8. To pay the petitioner for all the services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the petitioner's Warehouse as hereinbefore set forth, the Railroad Company agrees to pay various sums therein set out, the amounts varying according to the commodity handled and the quantity handled.

9. Included in the services of loading, unloading and "handling" freight for the Pennsylvania under its contracts, the petitioner renders as agent of the Pennsylvania Railroad a variety of terminal services incident to the transportation duties of the Pennsylvania Railroad as a common carrier, such as: removing and recording the seals from car doors and preserving the record thereof; examining the merchandise in the car and noting the damage and cause for same; prompt inspection of equipment; prompt loading and unloading to minimize the delay to the equipment; storing the shipment for forty-eight hours including its protection against fire and by insurance; taking up the bills of lading and canceling the same; delivering the merchandise to the consignee and taking the receipt therefor; handling claims for damage and disposal of refused merchandise; executing bills of lading for outbound shipments; tallying the contents of the car and placing seals on same.

10. All of said services covered by the said contracts and rendered by the petitioner are transportation services as defined by Section 1 of the Interstate Commerce Act, and as to all of them, the Pennsylvania Railroad is under legal obligation to perform them or cause them to be performed, [fol. 13] and the payment and consideration provided in

said contracts, are made for the performance by the petitioner of said transportation services as the duly designated agent of the Pennsylvania. No payment of any kind, direct or indirect, is made by the Pennsylvania to the petitioner except the payments for the said transportation services.

11. The petitioner has performed its obligations under said contracts with care and fidelity and to the satisfaction of the Pennsylvania Railroad Company and of the public. It has received as payment for its services under the said contracts upwards of $200,000 annually.

12. By complaint dated April 26, 1928, James Gallagher, Northeastern Warehouse Company, Walter A. Bailey and Terminal Warehouse Company, brought the complaint before the Interstate Commerce Commission above referred to, which complaint was docketed by the Commission as Docket #20968. It avers that the complainants own and operate warehouses in Philadelphia in competition with your petitioner, that both complainants and your petitioner were shippers within the meaning of the Interstate Commerce Act and that the Pennsylvania Railroad, in the form of traffic allowances, was refunding to the petitioner part of the published rates and thereby was collecting from the petitioner a less compensation than it collected, and was collecting from the complainant for rendering like and contemporaneous services under substantially similar circumstances and conditions in violation of Sections 2 and 3 of the Interstate Commerce Act. At the same time Walter A. Bailey, and others complained of similar payments made to other Warehouse Companies by the Baltimore and Ohio [fol. 14] Railroad Company, and Rex and Company, Inc., and others complained of similar payments made to other Warehouse Companies by the Reading Company. The said complaints were docketed by the Interstate Commerce Commission as Docket No. 20968 Sub #1, and 20968, Sub #2, respectively.

13. Thereafter the Pennsylvania answered denying the charges of violation of the Interstate Commerce Act. Your petitioner petitioned the Interstate Commerce Commission for leave to intervene. The Commercial Exchange of Phila.

delphia, The Grocers and Importers Exchange of Philadelphia, Philadelphia Board of Trade, Philadelphia Bourse, and the Association of Manufacturers' Representatives, Inc., also petitioned the Commission for leave to intervene in the case averring that the arrangements complained of had been in effect for many years, and had added greatly to economy, convenience and expedition in the handling of freight and that interference with the arrangement would be greatly prejudicial to the business interests of Philadelphia. Said petitions were granted by the Commission.

14. Thereafter the Commission consolidated the three cases above named and set them all for hearing before an Examiner of the Commission on July 30, 1928. On the said date and subsequent dates, the complainants, the defendants, and the intervenors presented testimony before the said Examiner. A copy of the transcript of said testimony, the exhibits (including the contracts between the petitioner and the Pennsylvania Railroad), the complaint, the answer, the petitions of intervenors and the order of the Commission therein, will be offered in evidence at the hearing of this petition.

[fol. 15] 15. Thereafter, to wit, on December 28, 1929, the Division Three of the Commission (who, under the Interstate Commerce Act, as amended, are empowered to act in behalf of the Commission) acting by Commissioners Aitchison and Porter, filed a report and order in the matter. One report and one order was made to cover all three complaints. A copy of said report and order is attached hereto and made a part hereof.

16. By the said order which was to become effective on February 10, 1930, (and by subsequent action was, upon the petition of your petitioner, postponed until February 25, 1930), the Pennsylvania Railroad is required to cease, desist and abstain from making the payments to your petitioner which it has contracted to make and is required to cancel its tariff provisions which make the warehouses of petitioner a part of the Pennsylvania's station facilities at Philadelphia.

17. Thereafter your petitioner petitioned for a rehearing or reargument before the full Commission. Said peti-

tion was denied by the Commission on February 10, 1930. With the denial of the said petition, Petitioner's remedies before the Interstate Commerce Commission were exhausted.

18. Petitioner charges and avers:

(a) The Commission's order in the premises aforesaid is invalid and of no legal force or authority, and therefore the same should be declared to be null, void, and of no effect.

(b) As appears from the proceedings of the Commission, as set forth in its report, said order proceeds upon the conclusion of the Commission that petitioner is to be deemed the consignor of shipments from and consignee of ship- [fol. 16] ments to its warehouses. The said conclusion on the part of the Commission is not substantiated by any evidence produced before it, but is contrary to and inconsistent with all the evidence adduced in said proceedings and is inconsistent with recognized principles of law defining and creating the relations of shipper, consignor and consignee with a common carrier. In fact and in law the petitioner is not in any legal sense within the meaning and intent of the Interstate Commerce Act or otherwise, a shipper, consignor, or consignee in respect to any of the property with regard to which it receives a payment from the Pennsylania Railroad Company.

(c) As appears from the said report, the order proceeds upon the conclusion that the facilities of petitioner's warehouses were only nominally opened to the general public as Railroad freight stations and were not, in fact, public stations in that they were confined to the handling of merchandise for the patrons of the Warehouses; whereas the evidence shows that some of the warehouses operated by the petitioner are the property of the carrier, are recognized public stations opened to the general public and that all of such warehouses are and have been for many years actually used by the public. The Commission proceeds upon the erroneous legal proposition that a warehouse by tariff publication open to all of the public and actually used by such portion of the public as are patrons of the warehouse, is not in true contemplation of law, a public station.

(d) As appears from the report of the Commission said order proceeds upon the conclusion of the Commission that the services performed by the petitioner in connection with the loading and unloading of freight are, in fact, performed for the benefit of the owners of the merchandise rather than for the Railroad. The undisputed evidence shows that the Railroad Company undertakes by its tariff [fol. 17] to load and unload the freight and the said service is therefore not "performed for the benefit of the owners of the merchandise" in any other sense than all transportation services benefit the owners of the merchandise. The said order proceeds upon the erroneous proposition of law that the Railroad Company cannot pay its agent for rendering a transportation service if that service is performed for the benefit of the owners of the freight.

(e) As appears from the report of the Commission said order proceeds upon the conclusion that the petitioner had been given dominion over the goods for transportation purposes and accordingly for transportation purposes it should be deemed the consignor of shipments from or the consignee of shipments to its warehouses. The undisputed evidence shows that as to inbound freight petitioner is not "given dominion over" the goods by the owner thereof, but receives them from the Railroad Company in order that petitioner may perform the transportation service for which the Railroad Company had obligated itself. As to outbound goods, the evidence shows that the petitioner "is given dominion over" the goods by the owner thereof for warehousing purposes in some cases and for transportation purposes in others. That is to say, in some cases the goods are first delivered to the petitioner by the owner for warehousing purposes and not for transportation purposes, and for the rendition of such warehousing services the petitioner receives no compensation from the Railroad Company. In other cases the goods are delivered by the owner to the petitioner for loading onto cars, i. e., the petitioner is given domain over the goods for transportation purposes in the same way as the Railroad Company is given dominion over the goods when they are delivered at a station operated by the Railroad Company. For the rendition of this transportation service, the petitioner is paid by the Railroad [fol. 18] Company. The order is based upon the erroneous

proposition of law that petitioners may be "deemed" consignors or consignees of shipments as to which they are neither consignors nor consignees.

(f) As appears from the report of the Commission, said order proceeds upon the conclusion that the practice of the Railroad Company in making payments to the petitioner for loading or unloading package freight while refusing to make similar payments to the complainants resulted in unjust discrimination between the petitioner and the complainants, in undue preference to the petitioner, and in undue prejudice to the complainants. If petitioner and complainants were within the contemplation of Sections 2 and 3 of the Interstate Commerce Act and if such discrimination, preference or prejudice were undue and unjust, the same could be removed as a matter of law by giving allowances to both the petitioner and the complainants. The order of the Commission does not permit such a method of removing the alleged unjust discrimination, undue preference and undue prejudice. The order is based upon the erroneous proposition of law that unjust discrimination, undue preference and undue prejudice, if they exist, cannot be removed by an order permitting the defendant to make to complainants payments similar to those made to petitioner.

(g) As appears from the report of the Commission, the said order proceeds upon the conclusion that the payments made to the petitioner are nothing more than a device or attempt to lend legality to the payment of rebates to the petitioner. A rebate is a deduction from the published rate which finds its way into the pocket of the consignor, consignee or owner of the freight. The undisputed evidence shows that petitioner is not the owner, consignor or consignee of the freight and that the consignor, consignee or owner of the freight in every instance pays the full published tariff rate, and receives no rebate or drawback [fol. 19] therefrom. The order is based upon the erroneous proposition of law that a payment made by a railroad to its agent for the rendition of a transportation service is the payment of a rebate to a shipper.

(h) The order is beyond the jurisdiction and beyond the power of regulation conferred upon or vested in the

Commission for the reason that the Interstate Commerce Act delegates no power to the Commission to interfere with the right of a carrier to employ exclusively a particular agent or agents to perform transportation service which the carrier is required to perform either under its tariff or by virtue of its common law or statutory duties and obligations.

(i) The said order is beyond the jurisdiction and beyond the power of regulation conferred upon or vested in the Commission for the reason that the Interstate Commerce Act delegates no power to the Commission to supervise, control or regulate the designation by carriers of terminal stations or of the internal management of said stations, or of the payment of compensation for the internal management of said stations.

19. The said order of the Commission unless set aside and annulled by this Court will operate to deprive the petitioner of the enjoyment of its rights under its said contracts with the Pennsylvania, and will, in fact, completely destroy said contracts and all property rights of the petitioner therein. By force of said order, the Pennsylvania will be constrained by the Commission to nullify or break its said contracts with the petitioner or terminate them and your petitioner is informed and believes that the Pennsylvania acting under the compulsion and duress of said order, will be required to nullify and set aside its contracts with petitioner.

Petitioner therefore avers for the reasons aforesaid that the said order of the Commission is in violation of the Constitution of the United States and the amendments [fol. 20] thereto, for the reason that it will deprive the petitioner of its property without due process of law.

20. The practice of unloading the carload freight at Petitioner's warehouse and other contract warehouses in the City of Philadelphia at the cost of the carriers has been in effect in Philadelphia for many years, in some cases, as long as forty years. During that time the trade has accustomed itself to that practice and merchants have made arrangements with their purchasers, sellers and principals, based on the continuance thereof. The prohibition of the continuance of that practice during the period when the

legality of the Commission's order is under consideration by the Court would throw the entire trade into confusion and would cause irreparable damage to your petitioners as well as to the mercantile interests of Philadelphia generally.

21. If a temporary stay or suspension, or interlocutory injunction or restraining order pending a final decree in this case is not granted, the Pennsylvania will amend its published tariffs on file with the Commission, so as no longer to undertake to unload carload package freight at the stations and warehouses operated by petitioner, and so as no longer to provide for the payment of compensation to petitioner and it will cease to pay to the petitioner the compensation provided for in the contracts above mentioned. Petitioner will thereupon be under the compulsion of making changes in the schedule of charges which it must collect from its customers and otherwise disturb and amend its established practices in conducting its warehouse business as aforesaid which changes in business methods will [fol. 21] tend to disrupt the business of petitioner in a manner that cannot be compensated for in damages if and when the Courts shall decide upon a final hearing that the order of the Interstate Commerce Commission is invalid.

Therefore petitioner prays:

1. That upon the filing of this bill the Judge of this Court call to his assistance two other Judges, one of whom shall be a Circuit Judge in accordance with the Act of Congress approved October 22, 1913, 38 Statutes 220 U. S. Code Title 28, Section 47.

2. That after no less than three days' notice to the Interstate Commerce Commission, and the Attorney General of the United States, there be ordered and granted by the Court a temporary stay or suspension of the operation of the order of the Commission entered December 28, 1929, in the matter of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey and Terminal Warehouse Company, vs. Pennsylvania Railroad Docket #20968, for sixty days from the date of the said order, as provided in Section 47 of Title 28 of the United States Code.

3. That upon not less than five days' notice, to the Interstate Commerce Commission, to the Attorney General of the United States, and to the Defendant Pennsylvania Railroad Company, an interlocutory injunction be issued suspending or restraining the enforcement, operation or execution of the said order until the further order of this Court.

4. That upon final hearing, this Court adjudge, order and decree that said order of the Interstate Commerce Commission dated December 28, 1929, is null and void and without warrant in law and that the same be set aside [fols. 22-37] and annulled and that the United States of America and the Interstate Commerce Commission, and each of them be perpetually restrained and enjoined from enforcing said order.

5. That your petitioner may have such other and further relief as to equity may appertain and as may be deemed by this Honorable Court fit and proper.

Merchants Warehouse Company, by George M. Richardson, Treasurer and General Manager. Allen S. Olmsted, 2nd, William A. Glasgow, Jr., M. Hampton Todd, Solicitors for Petitioner.

Duly sworn to by George M. Richardson. Jurat omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE, AS AMENDED, FIXING TIME FOR HEARING, ETC.—Filed Feb. 17, 1930

Whereas it appears that this is a proceeding for a final decree to set aside and annul an order of the Interstate Commerce Commission, made in the matter of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company, complainants, against the Pennsylvania Railroad Company, defendant, Interstate Commerce Commission Docket No. 20968, entered on the 28th day of December, 1929, to become effective

on the 10th day of February, 1930, which effective date, by a subsequent order of the said Commission, was postponed until the 25th day of February, 1930.

And whereas it appears that the petitioner herein asks for a temporary stay or suspension of the operation of the order of the said Commission.

And whereas it further appears that under the provisions of the United States Code, Title 28, Section 47, the hearing in this Court is directed to be before a Court consisting of three Judges, one of whom shall be a Circuit Judge.

Now, therefore, it is ordered this 17th day of February, 1930, by the District Court of the United States for the [fol. 39] Eastern District of Pennsylvania, that the following Judges be called to my assistance to hear and determine the said application, to wit: United States Circuit Judge Victor B. Wooley and United States District Judge Oliver B. Dickinson.

It is further ordered that the application for a temporary stay be set for hearing before said Court on the — day of February, 1930, at 10 o'clock, at Philadelphia.

It is further ordered that immediate notice of the said hearing be given by the petitioner to the Interstate Commerce Commission and to the Attorney General of the United States by telegraph and by registered mail or by personal delivery.

(S.) J. W. Thompson, United States District Judge.

[fol. 40] IN UNITED STATES DISTRICT COURT

No. 5781

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed Feb. 21, 1930

To the Honorable the Judges of said Court:

The petition of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company, shows unto this Court as follows:

Your petitioner James Gallagher is an individual, trading and doing business under the name and style "Gallagher's Warehouses"; your petitioner Walter A. Bailey is an in-

dividual, trading and doing business under the name and style "Bailey Warehouses"; and your petitioners Northeastern Warehouse Company and Terminal Warehouse Company are corporations duly organized and existing under the laws of the Commonwealth of Pennsylvania; each of your petitioners having its principal place of business in the City of Philadelphia, Pennsylvania. The above entitled proceeding grew out of the complaint in which James Gallagher, Northeastern Warehouse Company, Walter A. Bailey and Terminal Warehouse Company were complainants, The Pennsylvania Railroad Company was defendant, and The Merchants Warehouse Company was intervener, before the Interstate Commerce Commission, Docket No. 20968, and as a result of the hearing of the said complaint an order was passed by the Interstate Commerce Commission, a copy of which is attached to the petition of The Merchants Warehouse Company in this proceeding; that [fol. 41] this proceeding is brought by The Merchants Warehouse Company to set aside the said order of the Interstate Commerce Commission; that your petitioners are deeply interested in and affected by the said order of the Interstate Commerce Commission; that it is necessary for the protection of the interests and rights of your petitioners that your petitioners be made parties to this proceeding.

Your petitioners desire to intervene in this proceeding as parties defendant for the purpose of being heard and protecting their rights.

Wherefore your petitioners pray that an order may be passed by this Honorable Court permitting your petitioners to intervene as parties defendant in the above-entitled proceeding.

James Gallagher, by James Gallagher, Jr. Northeastern Warehouse Company, by Blair R. Miller, Supt. Walter A. Bailey, by Walter A. Bailey. Terminal Warehouse Company, by Ernest V. D. Sullivan, Pres. John J. Hickey, Solicitor for the Petitioners. Theodore L. Reimel, Local Counsel.

[fol. 42] IN UNITED STATES DISTRICT COURT

No. 5781

[Title omitted]

Before Woolley, C. J., Thompson & Dickinson, D. J.

ORDER GRANTING LEAVE TO INTERVENE—Filed Feb. 21, 1930.

On the foregoing petition it is on this 21st day of February, 1930, by the District Court of the United States for the Eastern District of Pennsylvania, ordered:

That James Gallagher, Northeastern Warehouse Company, Walter A. Bailey and Terminal Warehouse Company be permitted to intervene in the proceedings of the above-entitled case as parties defendant for the purpose of being heard and protecting their rights.

By the Court.

Attest:

(S.) Theodore L. Cobaugh, Deputy Clerk.

[fol. 43] IN UNITED STATES DISTRICT COURT

No. 5781

[Title omitted]

ORDER ALLOWING A TEMPORARY STAY OF THE OPERATION OF THE ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed Feb. 21, 1930.

Whereas, by petition filed February 14, 1930, the Petitioner, the Merchants Warehouse Company, prays the District Court to call to its assistance two other Judges, one of whom shall be a Circuit Judge, in accordance with Title 28, Section 47, of the United States Code, and prays that this Court set aside and annul an order of the Interstate Commerce Commission entered in the matter of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company against the Pennsylvania Railroad Company, I. C. C. Docket #20968,

and also praying for a temporary stay or suspension of the operation of the said order.

And whereas, it appears that the said order of the Interstate Commerce Commission is to become effective Feb-
[fol. 44] ruary 25, 1930.

And whereas, on February 17, 1930, the Honorable J. Whitaker Thompson entered an order calling to his assistance United States Circuit Judge, Victor B. Woolley, and United States District Judge, Oliver B. Dickinson, to hear and determine the said application and setting the application for a temporary stay for hearing before the said special Court on February 21, 1930.

And whereas, it appears that notice of the said hearing was given by the petitioner to the Interstate Commerce Commission and to the Attorney General of the United States by telegraph and by registered mail on February 17, 1930.

And whereas, a hearing was held upon the said application for a temporary stay in the Court Rooms of the United States Circuit Court of Appeals at Philadelphia, on February 21st, 1930, before the said special Court, at which hearing divers witnesses in behalf of the petitioner were examined under oath.

Now therefore, this Court finds, based upon the evidence submitted to the Judges comprising the said special Court at the said hearing on February 21, 1930, that irreparable damage would ensue to the petitioner, the Merchants Warehouse Company, unless the operation of the said order is stayed or suspended in whole during the pendency of this petition before this Court.

And it is therefore ordered, adjudged and decreed that the said order of the Interstate Commerce Commission in the matter of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse [fol. 45] Company vs. Pennsylvania Railroad Company, I. C. C. Docket #20968, be stayed and suspended in whole for a period of sixty days from the date hereof.

It is further ordered, adjudged, and decreed that the said petition be set for final hearing before this special Court at Philadelphia in the Court Rooms of the Circuit

Court of Appeals for the third circuit on the Twenty-sixth day of March next at 10 A. M.

(S.) Victor B. Woolley, Circuit Judge. (S.) J. W. Thompson, District Judge. (S.) O. B. Dickinson, District Judge.

February 21, 1930.

Service accepted by J. Stanley Payne for Interstate Commerce Commission; by Elmer B. Collins for the United States of America.

[fol. 46] IN UNITED STATES DISTRICT COURT

In equity. No. 5781

[Title omitted]

ANSWER OF NORTHEASTERN WAREHOUSE COMPANY, JAMES GALLAGHER, WALTER A. BAILEY, AND TERMINAL WAREHOUSE COMPANY, INTERVENERS.—Filed Feb. 25, 1930.

I

Northeastern Warehouse Company, James Gallagher, Walter A. Bailey and Terminal Warehouse Company, interveners, for answer to the petition filed herein by The Merchants Warehouse Company, petitioner, say:

1. Answering paragraphs 1, 2, 3 and 4 of the petition said interveners admit, for the purposes of this suit, that the allegations in those four paragraphs are true, except that said interveners deny that this suit was instituted or may be maintained under the general equity jurisdiction of the District Court of the United States for the Eastern District of Pennsylvania.

2. Answering paragraphs 5, 6, 7, 8, 9, 10 and 11 of the petition, said interveners deny the truth of each and all of the allegations made in those seven paragraphs.

3. Answering paragraphs 12 and 13 of the petition, said interveners admit that the allegations made in those two paragraphs are true.

4. Answering paragraph 14, said interveners admit that the allegations in that paragraph are true with the exception that said interveners do not, and cannot admit that the petitioner will offer certain evidence at the hearing of the petition.

5. Answering paragraphs 15, 16 and 17 of the petition, [fol. 47] said interveners admit the truth of the allegations in those three paragraphs.

6. Answering paragraphs 18, 19, 20 and 21 of the petition, said interveners deny the truth of the allegations in those four paragraphs.

7. Further in answer to paragraphs 18 (b), 19 and 21 of the petition, it appears that the petitioner does not assert the rights of a shipper, rate payer or carrier that can be directly affected by the measure of freight rates or an order of the Interstate Commerce Commission directed to any matter arising under sections 2 or 3 of the Interstate Commerce Act. The petitioner seeks an adjudication of certain contracts and of a question relating to compensation for services alleged to have been performed by the petitioner for the Pennsylvania Railroad Company. This court, constituted by virtue of the Act of Congress, approved October 22, 1913, 38 Stat. 220, is without authority to pass on such questions as to contracts and compensation.

8. Further answering the petition, said interveners deny any and all allegations therein, other than those expressly admitted herein.

9. Further answering the petition, said interveners say that the Interstate Commerce Commission is fully empowered to make the order challenged in the petition; that said order is valid and is supported by substantial evidence, and that the petitioner has not shown that said order is invalid or is without substantial support of evidence.

Wherefore, having fully answered the petition, said interveners pray that the prayer of petitioner be denied and

that the petition be dismissed at the cost of the petitioner.

Northeastern Warehouse Company, James Gallagher, Walter A. Bailey, Terminal Warehouse Company, interveners. (S.) John J. Hickey, Solicitor for the Interveners, 800 Southern Building, Washington, D. C. (S.) Theodore L. Reimel, Local Counsel.

[fol. 48] IN UNITED STATES DISTRICT COURT

No. 5781

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed Mar. 6, 1930

The Interstate Commerce Commission, respondent in the above-entitled suit, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs 1, 2, 3, and 4 of the petition, the Commission admits, for the purposes of this suit, that the allegations therein contained are true, except that the Commission denies the suit was commenced or may be maintained under the general equity jurisdiction of the District Court.

II

Answering paragraphs 5 to 21, both inclusive, of the peti-
[fol. 49] tion, the Commission admits, for the purposes of this suit, that the allegations contained in paragraphs 12, 13, 14, 15, 16, and 17 are true, and admits and alleges that it made the report and order dated December 28, 1929, in a proceeding then pending before it entitled James Gallagher, et al. v. Pennsylvania Railroad Company, Docket No. 20968, which proceeding also embraced No. 20968, Sub. No. 1, Walter A. Bailey, et al. v. Baltimore & Ohio Railroad Company, and No. 20968, Sub. No. 2, Rex & Company, Inc.,

et al. v. Reading Company, a copy of which report and order is attached to and made a part of the petition; that the Commission refers the court to the text of said report and order for full, complete, and accurate information concerning the contents of said report and order and for a description of the proceedings before the Commission upon which the report and order were and are based.

The Commission further alleges that at the hearings referred to in paragraph 14 of the petition, in connection with the subject matters covered by said report and order, the Commission accorded to all interested parties, including petitioner herein, a full and fair opportunity to be heard; that at said hearings a large volume of testimony and other evidence bearing upon said matters was submitted to the Commission for consideration on behalf of said parties, including the petitioner herein, by their respective counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and made and entered said report and order, which included the Commission's findings [fol. 50] of fact, decision, conclusions, orders, and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that the findings and conclusions in said report of December 28, 1929, were and are, and that each of them was and is fully supported and justified by the evidence submitted to the Commission in said proceedings as aforesaid.

The Commission further alleges that in making said report of December 28, 1929, it considered and weighed carefully in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties in said proceeding by their counsel, including matters covered by the allegations of the petition herein.

The Commission further alleges that said order of December 28, 1929, was not made or entered either arbi-

trarily, or unjustly. or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it and the Commission denies each of and all the allegations to the contrary contained in the petition.

III.

Further answering paragraphs 18, 19, 20, and 21 of the petition, the Commission denies that said order of December 28, 1929, is either unlawful or void, for the reasons, or for any of the reasons, set forth in said paragraphs. The Commission particularly denies that the petitioner will suffer either irreparable damage or irreparable injury as alleged in paragraphs 19, 20, and 21 of the petition unless said order of December 28, 1929, is enjoined and set aside by the court.

[fol. 51] Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition in so far as they conflict with the allegations herein, or with either the statements or conclusions of fact included in said report and order of December 28, 1929, which report and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by (S.) J. Stanley Payne, Assistant Chief Counsel. (S.) Daniel W. Knowlton, Chief Counsel, of Counsel.

Duly sworn to by Claude R. Porter. Jurat omitted in printing.

[fol. 52] IN UNITED STATES DISTRICT COURT

No. 5781

[Title omitted]

PETITION OF COMMERCIAL EXCHANGE OF PHILADELPHIA, GROCERS' AND IMPORTERS' EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, PHILADELPHIA BOURSE, AND THE ASSOCIATION OF MANUFACTURERS' REPRESENTATIVES, INCORPORATED, FOR LEAVE TO INTERVENE AND ORDER PERMITTING INTERVENTION—Filed Mar. 8, 1930

Now come the Commercial Exchange of Philadelphia, Grocers' and Importers' Exchange of Philadelphia, Philadelphia Board of Trade, Philadelphia Bourse, and the Association of Manufacturers' Representatives, Incorporated and respectfully petitions the Court for leave to intervene in the above case in accordance with Section 212 of the Act approved October 22, 1913, 39 Stat. 219, U. S. Code, Title 28, Section 45a, and as reason therefore aver:

Petitioners were parties in interest to the proceeding before the commission, to wit: James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company, vs. Pennsylvania Railroad Company, I. C. C. Docket #20968, having been permitted to intervene by the Commission. They presented evidence before the Commission, appeared by counsel, filed briefs, and participated in the oral argument before the Commission. They are Corporations and Associations who are interested in the controversy or question before the Inter-

[fols. 53 & 54] state Commerce Commission.

Commercial Exchange of Philadelphia, Grocers' and Importers' Exchange of Philadelphia, Philadelphia Board of Trade, Philadelphia Bourse, Association of Manufacturers' Representatives, Incorporated, by (S.) Allen S. Olmsted, 2nd, Attorney.

Before Woolley, C. J., and Thompson and Dickinson, D. J.

Order

And now, to wit, this 21st day of February, upon motion of Allen S. Olmsted, 2nd, Esquire, the said Commercial Ex-

change of Philadelphia, Grocers' and Importers' Exchange of Philadelphia, Philadelphia Board of Trade, Philadelphia Bourse, and Association of Manufacturers' Representatives, Incorporated, are permitted to intervene in the above case as party plaintiffs with right to appear by counsel and present testimony.

By order of the Court.

Attest: (Sgd.) George Brodbeck, Clerk.

[fol. 55] IN UNITED STATES DISTRICT COURT

In Equity. No. 5781

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed Mar. 15, 1930

United States, one of the respondents in the above entitled case, for answer to the petition heretofore filed therein against it says:

I

United States admits for the purposes of this suit the matters and conclusions alleged in paragraphs 1, 2, 3 and 4 of the petition, except that it denies that the suit was commenced or can be maintained under the equity jurisdiction of this Court.

II

United States denies the truth of the allegations contained in paragraphs 5 and 6 of the petition, except this: It admits that the Pennsylvania Railroad Company (hereinafter termed the Pennsylvania) has on file with the Interstate Commerce Commission certain tariffs which provide that "allowances" will be paid to petitioner on carload package freight "handled through" petitioner's warehouses.

III

Answering paragraphs 7 to 9, both inclusive, of the peti-
[fol. 56] tion, United States admits that petitioner and

the Pennsylvania have entered into the agreements mentioned in said paragraph 7, and that said agreements contain the provisions, in substance, set forth in said paragraphs 7 and 8; but United States particularly denies that the alleged "services" described in said paragraphs are performed by petitioner for the Pennsylvania; and alleges that said services are performed by petitioner in the conduct and as part of its own private merchandise warehouse business; and further alleges that they are not services for which the Pennsylvania may lawfully pay allowances to petitioner, and for which petitioner may lawfully receive allowances from the Pennsylvania.

IV

United States denies the allegations contained in paragraph 10 of the petition.

V

Answering paragraph 11 of the petition, United States admits that petitioner has received large sums of money annually from the Pennsylvania purporting to be "allowances" out of freight rates for services performed by petitioner; but denies that petitioner performed said services for the Pennsylvania; and alleges that said services are not those for which said sums, or any other sum, may lawfully be paid by the Pennsylvania to, or lawfully received by petitioner from the Pennsylvania.

VI

United States admits for the purposes of this suit the allegations of paragraphs 12 to 17, both inclusive, of the petition.

VII

Answering paragraphs 18 to 21, both inclusive, of the petition, United States denies that the order of the Inter- [fol. 57] state Commerce Commission is invalid, of no legal force or authority, null, void, or in violation of the Constitution of the United States for the reasons set forth and alleged in said paragraphs, or for any other reasons; and

particularly denies that petitioner will suffer irreparable damage or other legal injury if said order is not temporarily stayed, suspended or restrained.

VIII

Further and affirmatively answering the allegations of the petition, United States alleges that said Commission was fully empowered by the Interstate Commerce Act to make said order; that said order is valid, and is fully supported by substantial evidence duly submitted by the parties to the proceeding then pending before the Commission and in which it entered said order; and United States denies each and every allegation to the contrary contained in the petition.

IX

Except as herein expressly admitted, United States denies the truth of each and every allegation contained in the petition.

Wherefore, having fully answered, United States prays that the relief sought be denied and the petition dismissed with costs to petitioner, and for the benefit of such other orders or decrees as the Court may deem just and proper in the premises.

(S.) Elmer B. Collins, Special Assistant to the Attorney General. (S.) John Lord O'Brian, Assistant to the Attorney General. (S.) Calvin S. Boyer, United States Attorney.

[fol. 58] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 59] In United States District Court

No. 5781

[Title omitted]

Order Substituting Trial Judge

And now, to wit, March 26th, 1930, it is ordered that the Order of February 17, 1930, in the above matter, be

amended by substituting the name of Honorable Joseph Buffington in place and stead of Honorable Victor B. Woolley as therein contained.

By the Court:

(S.) J. W. Thompson, J.

[fol. 60] IN UNITED STATES DISTRICT COURT

No. 5781

[Title omitted]

ORDER CONTINUING THE TEMPORARY STAY OF THE ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed Apr. 15, 1930

Whereas, by petition filed February 14, 1930, the Petitioner, The Merchants Warehouse Company, prayed this Court to set aside and annul an order of the Interstate Commerce Commission entered in the matter of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company against the Pennsylvania Railroad Company, I. C. C. Docket #20968, and also praying for a temporary stay or suspension of the operation of the said order.

And whereas, this Court on February 21, 1930, entered an order staying and suspending the order of the Interstate Commerce Commission for a period of sixty days from that date.

And whereas, a final hearing before this Court was held at Philadelphia, on March 26, 1930.

[fols. 61 & 62] And whereas, it appears that irreparable damage would ensue to the petitioner, The Merchants Warehouse Company, if the said order of the Interstate Commerce Commission went into effect during the pendency of this litigation.

Now therefore, this Court finds, based upon the evidence submitted to it that irreparable damage would ensue to the petitioner, The Merchants Warehouse Company, unless the operation of the said order is stayed or suspended during the pendency of this litigation.

It is therefore ordered, adjudged and decreed that the said order of the Interstate Commerce Commission in the matter of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company vs. Pennsylvania Railroad Company, I. C. C. Docket #20968, be and hereby is stayed and suspended until the further order of this Court.

(S) Joseph Buffington, Circuit Judge. (S) J. W. Thompson, District Judge. (S) O. B. Dickinson, District Judge.

Filed April 15, 1930.

[fol. 63] In United States District Court for the Eastern District of Pennsylvania

In Equity

No. 5781. No. 5789. No. 5791

Merchants Warehouse Company et al.

v.

United States and Interstate Commerce Commission

Before Buffington, Circuit Judge, and Thompson and Dickinson, District Judges

Opinion of the Court—Filed Oct. 8, 1930

Thompson, District Judge:

The Merchants Warehouse Company, the Pennsylvania Warehousing and Safe Deposit Company, and the Philadelphia Warehousing and Cold Storage Company filed bills in equity praying for an order and decree to annul and set aside an order of the Interstate Commerce Commission entered on December 28, 1929. The order of the Commis-
[fol. 64] sion was promulgated in three cases, which were consolidated, heard together, and decided in the report of the Commission, entitled Gallagher et al. v. Pennsylvania Railroad Company, 160 I. C. C. 563.

The complaints before the Commission charged that certain allowances paid to the plaintiff warehouse companies by the Pennsylvania Railroad Company, the Reading Company, and the Baltimore and Ohio Railroad Company, defendants before the Commission, subjected the complainant warehouse companies to unjust discrimination, undue prejudice and disadvantage, and unduly preferred and advantaged the plaintiff warehouses, with which the complainants were competitors as warehousemen, in violation of Sections 2 and 3 of the Interstate Commerce Act.

The plaintiff warehouses and the complainants before the Commission, who are intervening defendants in this proceeding, operate at Philadelphia warehouses, at and from which they ship and receive, load, unload, store, distribute, and deliver in small quantities carload lots of merchandise, known as "package freight," carried or to be carried at carload rates, which they have previously solicited for such handling from their customers located generally in cities outside of Pennsylvania. For those services they collect from their customers certain warehouse rates and charges.

The business in which the warehouses with which we are concerned are engaged, is thus described in the Commission's report:

"In all the larger cities, including Philadelphia, public warehouses are customarily used for the receipt, storage, and distribution of merchandise. That these warehouses perform an important public service is undisputed. The merchandise warehouse receives goods in carloads and [fol. 65] distributes them in smaller quantities to local jobbers or retailers, or re-ships them in less-than-carload lots to near-by destinations; issues negotiable and non-negotiable receipts, provides insurance, and allows credit to be obtained on merchandise stored; provides recoopering, marking, and separation of varieties, and various incidental clerical services. Warehouse services enable manufacturers to keep spot stocks for their customers; equalize production by steadily absorbing the manufacturers' output while eliminating heavy investment in reserve storage space; reduce freight charges and save time in transit through handling goods in carload quantities; reduce fire risk and loss and damage claims; and eliminate the necessity of providing storage space at point of origin. Both complainants and the contract warehouses furnish these services."

The plaintiffs in the instant case operate, in competition with the interveners, who were complainants before the Commission, the same type of warehouses and render the same kind of services generally as the intervenors, for which charges are collected from their customers. The carriers, the Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, and the Reading Company, pay to the plaintiffs, in connection with the loading, unloading, and "handling" by them of such merchandise, certain sums, ranging from 30c to 50c per ton, but make no such payments to the warehouses which were complainants before the Commission. No payments are made if the shipments are unloaded within the forty-eight hours free time. The Pennsylvania Railroad Company pays the allowances in question to the Merchants Warehouse Company, the Baltimore and Ohio to the Pennsylvania Warehousing and Safe Deposit Company, and the Reading Company to the [fol. 66] Philadelphia Warehousing and Cold Storage Company, the plaintiffs here. Payments are also made by the Pennsylvania to the Quaker City Cold Storage Company and by the Reading to the Pennsylvania Warehousing and Safe Deposit Company. Neither of the latter warehouses have intervened in this proceeding.

In some instances, the carriers own the land or warehouses which the plaintiffs hold under lease. In other instances, the carriers do not own the land or the warehouses.

In the report of the Commission, because of the fact that the payments, which are alleged to be preferential, discriminatory and prejudicial as against the intervening defendants, are made in accordance with contracts with the respective carriers of many years standing, the warehouse companies, which receive the allowances are designated as "contract warehouses".

The contracts provide that the warehouse shall accord to traffic passing over the lines of the carrier preference in facilities furnished by the warehouse over traffic passing over other lines; shall load or unload or handle freight received to be shipped over the lines of the carrier, or received by the warehouse from the carrier for delivery to consignees; shall notify the consignees of the arrival of incoming freight; shall be responsible for the prompt collection of freight charges and other charges upon in-bound freight; shall indemnify and hold harmless the carrier for

all damage to and all loss of freight in the custody of the warehouse; shall maintain fire insurance; shall notify the carrier of the failure of consignees to receive freight; shall comply with directions with respect thereto received from the carrier; shall indemnify the carrier against liability on [fol. 67] account of any of the warehouses' acts of omission and on account of bills for merchandise issued by the warehouse. For those services the carriers agree to make payments to the contract warehouses as provided in the contracts.

The terminal services of the contract warehouses include the removing and recording of the seals from the cars placed for unloading, placing seals on loaded cars and preserving the record thereof, examining the merchandise, noting the damage and the cause thereof, the prompt inspection of the equipment, prompt loading and unloading to minimize delay, storing and shipment for the forty-eight hours free time, including protection against fire through insurance, taking up bills of lading and canceling the same, delivering the merchandise to the consignee and taking receipts therefor, handling claims for damage, disposal of refused merchandise, executing bills of lading for outbound shipments, tallying the contents of the cars.

The record thoroughly establishes the fact that the contract warehouses and the intervening warehouses are engaged in the same kind of business, and each ships and receives at its warehouses package freight of all kinds destined to or shipped from various points in the United States over the railroads, and that the circumstances and conditions surrounding handling and movement of the traffic are similar if not identical. It is further shown by the record that the services which the contract warehouses perform, for which the contract provide for the payment of compensation by the carrier to them, are performed, for their patrons, by the intervening defendants who were complainants before the Commission; that the latter load and unload the freight for their patrons, pay and collect freight [fol. 68] charges, send notices of arrival to their customers, check the contents of the cars, give the railroads reports, notify the railroads of damage to the freight, prepare bills of lading, mark and stencil packages, recooper and perform in general identical services for their patrons.

As to this, the Commission finds:

"The services performed by the contract warehouses do not differ in substance from those rendered by complainants. The warehouses of complainants and those of the contract warehouses are served by private side tracks or sidings connecting with the lines of one or more defendants. Both handle the same classes of freight and both obtain business by widespread advertising in prominent trade publications, by sending letters, pamphlets, and circulars to prospective customers offering them their services, and by personal solicitation. There is active and keen competition between complainants and the contract warehouses. Concerns using public warehouse facilities generally select the company offering them the lowest aggregate charge for the distribution of their goods. By means of the allowances the contract warehouses are able to quote lower charges than can complainants."

Evidence was introduced on behalf of the complainants before the Commission for the purpose of showing that all of the services performed by the contract warehouses, including the loading of freight into, and the unloading of freight from, railroad cars, are warehouse trade services which are performed by all merchandise warehouses under the terms of their contracts and arrangements with their patrons, the manufacturers and wholesalers, and not transportation services, and that the contract warehouses' [fol. 69] premises were not in fact public terminals of the carriers.

The Commission found from the evidence that:

"* * * the contract warehouses are compensated for the solicitation of freight for movement over the lines of the respective defendants through the payment of the allowances in question; that traffic considerations have been the primary motive for the payment of these allowances; that the facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact public stations, but are confined to the handling of merchandise for the patrons of the warehouses; and that the services performed by the contract warehouses in connection with the loading or unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are in fact performed

for the benefit of the owner of the merchandise rather than for defendants.

"While the contract warehouses are not the owners of the goods received or shipped by them, all of defendants' dealings are with these companies, and none with the owners of the goods. As to many of the inbound carload shipments, the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less-than-carload lots. The contract warehouses, even though not the owners of the goods, have been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses. The same is true as to complainants, shipments from and to their warehouses being handled in substantially the same manner."

[fol. 70] The Commission concluded that:

"* * * the practice of defendants in making allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia as aforesaid and refusing to make similar allowances to complainants for performing similar services results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants. The record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses. It is apparent that the unjust discrimination and undue prejudice can lawfully be corrected only by terminating the allowances."

The Commission accordingly entered its order of December 28, 1929, requiring the defendant railroads to cease, desist from, and abandon publishing or making allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia, and requiring the Pennsylvania and the Baltimore and Ohio Railroads to cancel tariff provisions which had been published by them, making the contract warehouses a part of their station facilities at Philadelphia.

Although the railroads were defendants before the Interstate Commerce Commission, they did not intervene in the instant proceedings and took no part through counsel or otherwise at the hearing and argument of the case. We must assume, therefore, that they are satisfied with the order requiring them to desist from the payments and to cancel their tariff provisions, not only those under which the payments are made to the petitioners, but those in which the petitioners' warehouses are designated as public freight stations.

[fol. 71] The original contracts, which the Commission has declared discriminatory and prejudicial, had their origin when there was nothing unlawful in contracts or arrangements between interstate carriers and the shipping public in making such allowances or deductions out of freight rates as have since been denounced and made unlawful by existing law, so that the question before the court is not whether the system set up was ethically bad but whether it is condemned by the law as it now is.

It is insisted on the part of the plaintiffs that the findings and order of the Commission are not supported by substantial evidence. It is not, however, contended that the courts may put their judgment as to finding of fact based upon substantial evidence against that of the Commission. The court may not inquire into the expediency of the order, nor will it consider facts further than to determine whether there was sufficient evidence to support the order. Interstate Commerce Commission v. Union Pacific Railroad, 222 U. S. 541. Nashville Railway Company v. Tennessee, 262 U. S. 318. Assigned Car Cases, 274 U. S. 564. The courts will not inquire into the soundness of the reasoning whereby the Commission's conclusions are reached. Interstate Commerce Commission v. Illinois Central Railroad Company, 215 U. S. 452. Skinner and Eddy Corporation v. United States, 249 U. S. 557. These are matters left by Congress to the administrative tribunal appointed by law and informed by experience. Illinois Central Railroad Company v. Interstate Commerce Commission, 206 U. S. 441. Assigned Car Cases, supra. And whether a practice is unjustly discriminatory or preferential is a question of fact entrusted exclusively by the act to the Commission for de-

[fol. 72] termination upon the evidence in a particular case.

Interstate Commerce Commission v. Alabama Midland Railway Company, 168 U. S. 144. Nashville Railway v. Tennessee, supra.

The case is very similar to the case of Terminal Warehouse Company of Baltimore City v. United States et al., 31 F. (2d) 951, where the Terminal Warehouse Company of Baltimore had a contract or arrangement with the Pennsylvania Railroad Company substantially similar to the contracts involved here. In the proceeding before the Commission, the practice of the railroad in paying the Terminal Company allowances for the performance of terminal services in connection with the loading and unloading of package freight at Baltimore, was found by the Commission to result in an unjust discrimination as against the McCormick Warehouse Company, which was conducting a warehouse business in competition with the Terminal Warehouse Company. The bill of complaint was dismissed upon the ground that the finding by the Commission of discrimination and unreasonable preferences was sustained by the evidence before the Commission.

In discussing the contentions of the Terminal Warehouse Company, Judge Soper said:

"The contention of the Terminal Warehouse Company is that the Commission's order is wrong, because the Warehouse Company has been designated in the tariff as a public station of the carrier, and hence in this place the carrier is obliged, under the exception to rule 27, to load and unload carload freight, and may employ and pay the Terminal as its agent to do the work. But the conclusion to which the Commission came destroys the essential premise upon which this argument is based; for it found that the Terminal Warehouses, although nominally open to the general pub-
[fol. 73] lic, are in fact confined to the receipt and forwarding of merchandise concerning which the Terminal is employed to render some warehouse service. We are bound by this conclusion of fact, if it is supported by substantial evidence. Anchor Coal Co. v. U. S. (D. C.) 25 F. (2d) 462, 471. In our opinion, the evidence not merely supports, but requires, the conclusion which the Commission has reached. It is true that 20 per cent. of all carload package freight, shipped to Baltimore over the Pennsylvania, is handled by the Terminal Warehouse, and that any shipper, desiring

warehouse facilities, may send his goods to its platform. But these circumstances do not constitute the warehouse a public station. It is not used by shippers or consignees, who do not require or desire the services of the Terminal Warehouse Company, and either do not make use of any warehouse, or send their goods to other warehouses of a private or public character. The distinction between this situation and that in the case of U. S. v. Baltimore and Ohio Railroad, 231 U. S. 274, 34 S. Ct. 75, 58 L. Ed. 219, upon which the complainant relies, is obvious; for there the premises used by the carrier as a freight station, although furnished and operated by a nearby shipper, who used it to a greater extent than any other shipper, was nevertheless open to all shippers and actually used for the benefit of all alike."

It is contended on behalf of the plaintiffs, in discussing Judge Soper's consideration of the argument for the Terminal Warehouse Company, that, while the evidence in that case may have justified the finding of the Commission that the warehouses there in question were not railway terminal stations, the decision was based upon the undisputed evidence that no shippers or consignees, who were not cus- [fol. 74] tomers of the warehouse company, used the warehouse as a shipping or delivery station. It is argued that in the instant case there is not sufficient evidence to show that shippers generally do not use the contract warehouses as railroad freight terminals, and they point, as evidence to the contrary, to testimony before the Commission showing that, during one year, 744 carloads of freight were brought by team and loaded in carload lots at the Merchants Warehouse, which were not placed in storage. It is argued that the negative testimony was not sufficient to support the finding of fact by the Commission in the face of the testimony about the 744 carloads.

As to the first proposition, that the positive evidence was not sufficient to establish the fact, we think that there is enough substance in it to support the Commission's findings, in view of the rule stated above that the courts cannot put their judgment as to conclusions of fact against that of the Commission. As to the testimony contra, it is not shown anywhere, as to the 744 carloads, that any of the

shippers of those carloads of freight were not patrons of the warehouse company handling them, although it performed no storage services as to those particular shipments, and the railroad company did pay it for loading onto the cars, as agreed under the contract. Moreover, there is evidence, oral and documentary, (the latter through circulars, advertisements, and pamphlets, soliciting business as merchandise and distributing warehousemen) that the sidings of the contract warehouses, where the cars were "spotted" for loading or delivered for unloading were designated by them as their "private sidings".

It is further argued on behalf of the plaintiffs that the service of loading, unloading, assorting, storing, and de- [fol. 75] livering the carload shipments rendered by the plaintiffs for their patrons at their warehouses after the carriers had delivered the cars to them upon their warehouse sidings, is not a trade service but is a transportation service. As has already been stated, the services rendered by the intervening warehouses are in every substantial detail the same as those rendered by the contract warehouses.

It cannot be contended that the intervening warehouses render a transportation service. If, therefore, under identical facts and circumstances their service to their patrons is not a transportation service, how can that of the contract warehouses become so merely because the railroads agree to perform the loading and unloading at the contract warehouses, and designate their private sidings as railroad terminals?

The question as to whether or not they are transportation services is a question of fact and, if supported by substantial evidence, is conclusive upon the court. United States v. Erie Railroad Company, 280 U. S. 98. Assigned Car Cases, supra.

There is no evidence of record to show that the railroads exercise any control over the plaintiffs' warehouses or their business, except that shown by the contracts, under which it is contended for the plaintiffs that they are employees and agents of the railroad company for performing the duties of loading and unloading, which the railroads, it is claimed, are under an obligation to perform for shippers and consignees at their designated terminal stations. This obligation, if it is such, arises from the

fact that the Pennsylvania Railroad and the Baltimore and Ohio Railroad have made provision in their tariffs by which they take upon themselves the service to consignors [fol. 76] and consignees of loading and unloading carload package freight carried at railroad rates.

Rule 27 of the official Consolidated Freight Classification, to which the carriers are parties, provides as follows:

"Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings."

The Pennsylvania Railroad and the Baltimore and Ohio Railroad provide in their tariffs by exceptions to Rule 27 that they agree to load or unload carload package freight at certain Philadelphia freight stations, included among which are the contract warehouses. The Reading Company has no such tariff provisions, but also pays its contract warehouses for performing the work of loading and unloading carload package freight as agreed in the contracts.

The plaintiffs point to these tariff provisions as justification for the payments by the railroads, upon the ground that the railroads, having assumed the obligation to load and unload, which under Rule 27 above cited rests upon the consignors and consignees, have exercised their right to select their employees to do this work for them and to designate their own terminal stations as the place where the service is to be performed; that, having the tariff obligation, they may limit themselves to the selection of their employees and may lawfully select the plaintiffs as such without being guilty of any unlawful discrimination, preference, or prejudice.

It is well settled that a railroad carrier may exercise its own discretion in the selection of its agents and employees to perform any part of its transportation service and that [fol. 77] the mere granting of privileges, which are incidentally a part of the compensation for services rendered, is not unlawful as preferential or discriminatory as against others who are not thus selected. Del. L. & W. R. R. Co. v. Morristown, 276 U. S. 182. Donovan v. Pennsylvania Co., 199 U. S. 279. Great Northern Ry. Co. v. Minnesota, 238 U. S. 340. Express Cases, 117 U. S. 1. Chicago, St. L. &

N. O. R. R. Co. v. Pullman Car Co., 139 U. S. 79. Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U. S. 518.

But there is substantial evidence to support the facts found by the Commission that the warehouses of the plaintiffs are not in fact open public freight stations of the railroads; that the service rendered by them under the contracts is a trade service and not a transportation service, in that it was rendered by the contract warehouses and by the intervenors, each for its patrons in precisely the same way; that thereby the plaintiffs are enabled to perform such service for their patrons for a lower charge than that for which the intervenors can perform the same service to their patrons.

It is clear that the payment of the allowances by the railroads under the contracts was not a consideration for employment in a transportation service.

Passing to the contention that the Commission was wrong in finding that the contract warehouses, even though not the owners of the goods, had been given dominion over such goods for transportation purposes and accordingly for transportation purposes should be deemed the consignors of shipments from or consignees of shipments to their warehouses, it is contended here, as it was in Terminal Warehouse v. United States, supra, that, inasmuch [fol. 78] as the Bills of Lading Act, 39 Stat. 545, Section 42, provides that, unless the context otherwise requires, "consignor" and "consignee" respectively mean the person named in the bill as the person from whom the goods have been received for shipment, or to whom the delivery of the goods is to be made, the contract warehouses cannot be deemed the consignors or consignees because the billing invariably names a consignor or consignee other than the warehouses.

It is well settled that the actual situation underlying a shipment rather than recitals in the shipping documents should control the application of the Acts of Congress. And while the billing in the instant case did not name the contract warehouses as consignors or consignees and the documents in consignments were made out "in care of" the warehouses, it is inconceivable that the mere wording of the shipping documents can justify a course of action

which would otherwise be contrary to law. Terminal Warehouse Co. v. United States, supra.

The Supreme Court has held that carriers may not lawfully discriminate for or against forwarders of goods. I. C. C. v. Del. L. & W. Railroad Company, 220 U. S. 235. United States v. Lehigh Valley R. R. Co., 222 Fed. 685. Lehigh Valley Railroad Co. v. United States, 243 U. S. 444. We follow the reasoning of Judge Soper in Terminal Warehouse Company v. United States, supra:

"Both the warehouse and the forwarder solicit and obtain the transportation of goods. The forwarder is concerned with the assembling of goods into carload lots at the point of shipment and the carriage of the same to one consignee, who may be the forwarding agent himself, and who receives the goods and distributes them to the parties for whom they are intended. The warehouseman is chiefly [fol. 79] concerned with the receipt and distribution of goods from the carrier after they have reached their destination. It is true that the forwarder is usually the consignor or the consignee of the goods, and it may be conceded arguendo that the warehouse company in this case is not. But both are closely related to the carriage of the goods and to the carrier, and both are entitled to the protection of the statute."

In our opinion, the Commission was right in finding that the actual business of the warehouses was not that of rendering service to the railroad companies in loading and unloading, and in storage for the account of the railroad companies, but that they were conducting a general warehousing business for their own patrons and that the payments made by the railroad companies under the guise of rendering service to them put the contract warehouse companies in the position of preference and advantage over the intervening warehouse companies which had the facilities and were engaged in business precisely similar to that of the plaintiffs; that by means of the payments the contract warehouses were enabled not only to obtain a preference and advantage for themselves over competing warehouses but also were enabled to perform for their patrons warehouse services and other services in connection with transportation at a less rate than could be ob-

tained for shippers who were patrons of the intervening warehouses.

We conclude that the payment of the allowances by the railroads under the contracts comes within the provisions of Section 2 of the Interstate Commerce Act, as amended by Section 404 of the Transportation Act of 1920, in that the contracts constitute devices whereby the carriers re- [fol. 80] ceive from the contract warehouses, through the deduction out of freight rates of the allowances, a less compensation for services rendered than they charge and receive from the intervening warehouses for doing a like service under substantially similar circumstances and conditions, and thereby subject the latter to unjust discrimination.

We further conclude that, under Section 3 of the above Act, the payment of the allowances gives an undue and unreasonable preference and advantage to the contract warehouses, and subjects the intervening warehouses to an undue and unreasonable prejudice and disadvantage.

Several trade and commercial organizations intervened on behalf of the plaintiffs, and at the argument and in their briefs they have reinforced the contentions of the plaintiffs and have predicted serious results to the commercial interests of Philadelphia in case the order of the Commission is allowed to stand. While these arguments ab inconvienti have had due consideration, we must determine the issues involved, unaffected by what the results may be, in accordance with the law as enacted. Such results as may flow from the order of the Commission are properly for the consideration of Congress and not the courts.

The bills are dismissed.

Dickinson, District Judge, concurs.

BUFFINGTON, C. J., dissenting:

This case concerns an order to desist issued by the Interstate Commerce Commission. There is no dispute about the facts. The only issue is one of law, namely the legal conclusion drawn from uncontradicted facts. Addressing myself to the latter and taking one renewal contract as [fol. 81] fairly illustrative of an agreed on practice beginning some forty years ago, I note that the Pennsylvania Railroad Company, hereafter called Railroad, and the Mer-

chants' Warehouse Company, hereafter called Warehouse, on January 25, 1917, contracted in writing, wherein the purpose of the parties was thus stated:

"Whereas the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouses of the said Warehouse Company situated on the plot of land bounded by Delaware Avenue, Walnut, Water and Chestnut Streets, in the City of Philadelphia, and State of Pennsylvania."

To carry out such purposes, railroad agreed to maintain tracks adjacent to warehouse, shift and deliver cars to warehouse "for the purpose of taking from and delivering to the same all freight to be shipped therefrom or delivered thereto." It further agreed to take and deliver such freight "at non-discriminatory rates and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia."

Railroad further agreed to pay warehouse "for all services rendered by it in and about the receipt and delivery of freight for account of the railroad company, both incoming and outgoing at the said warehouses," three and a half cents per barrel of flour up to fifty thousand barrels a month and two and a half cents over fifty thousand, and forty cents per ton of merchandise freight, etc. Railroad agreed not to go into storage business during the life of the contract, provided, however:

"that this covenant shall not be construed so as to prevent [fol. 82] the Railroad Company from warehousing freight in its terminals as an incident to delivery thereof or from entering into contracts for storage or other disposition of refused or unclaimed freight, nor shall it be so construed as to interfere with the performance by the Railroad Company of all obligations imposed upon it by law in respect to the carriage, storage or delivery of traffic."

On its part, warehouse agreed

"To indemnify and hold harmless the Railroad Company for all damages to, or loss of, freights in the custody or control of the Warehouse Company, and all liability by rea-

son thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor."

It agreed to collect and to be responsible for all freight on incoming shipments; to save the railroad harmless for damage to freight; to keep freight insured; to notify consignee of the arrival of goods; to notify railroad of non-removel of freight and "so long as it holds the said freight for account of the railroad company, to observe and comply with all directions with respect to such freight which may be received by it from the railroad company."

Warehouse further covenanted:

"To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouses, to be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it."

[fol. 83] It was mutually agreed that at "The expiration of the period during which the railroad shall currently allow freight to remain at his warehouse before delivery without charge" and freight has not been delivered to the consignee, such undelivered freight "shall be regarded and treated as stored with warehouse company by railroad for account of the owners thereof." The agreement ran for twenty years, with year to year continuance by consent and was non-assignable by warehouse. While it was in force, railroad was not to make any allowances to any other person or corporation for freight loading or unloading services to or from Philadelphia warehouses. The freight received and forwarded by these warehouses was for carload shipments and not for the non-carload freight which the railroad was equipped for and did handle at its own freight stations.

During the forty years such contracts have been in force, no shipper has complained either of the service afforded by the warehouse: of the use by the railroad of these ware-

houses as railroad forwarding or receiving stations; or that there has been in any way any discrimination in favor of other shippers, of any non-tariff rates exacted on freight or any rebate or allowance made or paid to other shippers. These contracts have been made with warehouses along their lines by all the three trunk lines that serve Philadelphia and there has been no complaint by them or any minor railroads that such contracts have diverted traffic from their lines. In point of fact, on delivery of freight to the merchandise company, such freight was dealt with in precisely the same way as though delivered at an ordinary freight station of the railroad and when incoming freight arrived at the warehouse, it was treated exactly as [fol. 84] the railroad would have done had it arrived at a regular station, namely kept free of charge for the customary free days and subjected to storage charges if kept longer. On its face these contracts seem fair and legal. They have been acted on for years. During the period the Government operated the railroad no change was made in practice and there was no suggestion of illegality sanctioned or participated in by the Government during its control. As we have said, no shipper is complaining. The railroads, which have taken no part in this controversy, have found the system helpful in the prompt handling and quick release of cars and substantially all of the public trade bodies of Philadelphia have intervened and urged its continuance.

Turning to the proofs from the trade bodies representing the commerce of Philadelphia, and taking the present warehouse as an example, it is clear that this system of handling the great flour distributing system of a metropolitan city was the gradual evolution of years of experience and that it was the outgrowth of the needs of a great food supply business itself, calling on the railroads to help it, and not a system forced on shippers by the railroad. Hubert J. Horan, President of the Commercial Exchange, was familiar with the whole development. His testimony was that up to 1883 and prior to the establishment of storage warehouses, carload lots of freight were brought down Market and other streets and delivered to the private warehouses which lined the streets. After the street tracks were taken up, the railroad built this Merchants' Ware-

house, controlling it itself, but giving the public free right to buy stock. In other cases of these contract warehouses the entire stock was privately owned and the railroads held none of the stocks. The reason for building them was to [fol. 85] avoid the time lost in tieing up unloaded cars. What was wanted was an expeditious release of cars and lessening the number of them coming to their own stations and standing unoccupied on the railroad's own sidings. Without entering into details, it suffices to quote from this well informed and practically experienced witness, who says:

"This here thing has been worked out on the basis of the economic method of handling flour, and I might say the profits in the flour business are at the minimum and always have been."

The basic connection of this flour system with the food supply of the City is testified to by him as follows, and there is no proof to the contrary:

"Q. Would it be possible to go back to the old method of handling the flour, which was in effect prior to 1887?

A. I do not see how it would be possible for a flour man today, when you take into consideration the tremendous growth of Philadelphia since, and that we have to make deliveries to almost every part of Philadelphia—now for West Philadelphia as an illustration, we use 31st and Chestnut; for Kensington we use the warehouse up there; downtown we use 15th and Carpenter, Front and Federal, or Central we use Front and Chestnut. To get warehouses we couldn't get railroad connections today, I don't believe, and to make an economical delivery for the benefit of the people—the consumer, it would be an impossibility, and the cost would grow to such tremendous figures that I don't know, we would all have to localize our business. In other words, we could not make distribution really economically over the city of Philadelphia today."

Moreover, his testimony shows the great necessity of handling flour in the most economic way, as the profit is [fol. 86] but fifteen cents a barrel and if the present system was abolished, "it would put an additional burden on the articles, of 50 cents a ton, or practically, on flour, of five

cents a barrel, and the problem then would arise as to our ability to transfer that burden to the consumer, and we would be in a position where it would be really a question of whether we could do it." He further testified his judgment was that the margin of the profit of the flour dealers was so small—fifteen cents a barrel—that if the present system were changed, Philadelphia dealers in freighted flour could not continue the flour business and it would be absorbed by the big local mills. The practical mind will at once see that while the extinction of five cents profit on a barrel of flour seems so small as to amount to nothing of moment, in reality that five cents cuts down the possible present profit of the flour business thirty-three and a third per cent., a proportion which in its aggregate is sufficient to destroy such business.

Moreover, it goes without saying that the instant discharge of carload freights made by the contract warehouses and the consequent return to service of the cars, instead of allowing such cars to congest on railroad sidings and await discharge by a consignee at the end of forty-eight hours, is a basic factor in prompt railroad freight service. In that regard the proof by an official of the Reading Railroad is:

"These contracts were made many years ago, and of course there is no one available who can state of their own knowledge as to the conditions that brought about these agreements, but from general information that can be obtained, the railroad companies at that time felt the need of additional facilities, where this carload package freight could be unloaded and taken care of, delivered, where additional facilities could be provided for storage and general [fol. 87] service that might be required by the commercial interests of Philadelphia. It was also a factor advantageous to the carriers in having the equipment promptly released, as would not be the case on team track deliveries, and that in my belief brought about these contracts with the warehousing concerns."

So also one of the Baltimore and Ohio R. R. officials says:

"As the contract shows, the original contract, it was made in 1897, at the time the Baltimore and Ohio Railroad

was in the hands of receivers. In fact the contract was made by the receivers. At that time the facilities of the Baltimore & Ohio Railroad were limited, and the receivers were quite anxious to increase the facilities here in some manner, shape or form, which would enable them to secure a much larger tonnage into and out of Philadelphia than had been handled."

The testimony of J. E. Sands, Terminal Freight Agent of the Baltimore and Ohio R. R., is:

"Well, in the operation of a freight station, it is an active going concern, and freight has to move currently, and any congestion—any surplus amount of freight on the facility naturally retards your operation. There is a certain amount of clearance that we really figure that we have to have for a smooth operation of a freight station, for we clear up daily, and if we were to attempt to handle excess freight, creating a congested condition, it would be a serious matter with us."

Seeing then that this contract warehouse system is shown to be a practice of forty years standing; that similar contracts were from time to time made by the Federal Court of this District through its receivers; that these contracts were acted upon by the Government during its oper-[fol. 88] ation of the railroad; that no shipper is complaining of any favoritism to competitors or burden imposed on him; that the large commercial bodies have felt the issue was of such vital importance to the Commerce of Philadelphia as to constrain them to intervene and oppose the unsettling of the tried-out practice of a generation, and that the only parties who complain are six warehouses, the gravamen of whose complaint is that they have not been made by the several railroads public freight stations; that the order of the Commission does these six warehouses no good in that it does not require the railroads to make these six warehouses public freight stations, but only compels the railroads to no longer make the twenty-four warehouses public freight stations for it, considering, we say, that such is the practical, commercial freight-handling situation before us, we next inquire whether the situation was an illegal one which called for the preventive power vested in

the Interstate Commerce Commission to put an end to it. There is no proof of any corrupt motive, vicious purpose, or concealed or purposed fraud. Everything has been done openly and above board. The railroads have not and are not taking part in the controversy. No shipper is complaining and, as a practical question, the case resolves itself into a business dispute between twenty-four contract warehouses and six non-contract ones, with the Interstate Commerce Commission taking the part of the latter. Does the case warrant the order that body has made in supposed relief of these six? We say supposed relief, for in point of fact the order gives no affirmative relief to the six and only stops the present practice of the twenty-four. Its anticipated effect is to lessen railroad efficiency. It deprives shippers of the benefit of freight loading and un-[fol. 89] loading at twenty-four convenient public freight stations and it puts an end to a business system which the twenty-four warehouses have carried on, in some cases, for nearly forty years, and that without complaint.

We here take occasion to say that there is no proof whatever that in any case any of these contract warehouses was the actual consignee of the inbound carload freight delivered by them or the outbound lots shipped by them. The few isolated instances where they received pay for handling their own shipments were evidently oversights and were in violation of the railroad's ordered tariff provision that "no payment will be made on any traffic consigned to or by the warehouse company." So far as outbound freight was concerned, the proof is they simply received the freight from the shipper and shipped it as was done by the railroad freight agent at any of its other freight stations. In doing so they performed no service for the shipper and they did not make the use of their warehousing facilities a condition precedent to the shipper using the station. So far as inbound carload freights were concerned, the shipper, in order to advise the railroad as to its particular destination, marked the car in care of such or such a contract warehouse. Far from designating or making the warehouse the consignee of his freight or authorizing the warehouse to receive the goods on his behalf and thereby discharge the railroad from liability, the shipper did nothing of the sort. On the contrary, the shipper retained his bill of lading and with the consequent right of stopping in transit, in no way surrendered or in any way qualified his

ownership of his property and in fact did nothing by marking it in care of the warehouse, other than simply to show that the warehouse which the railroad by its contract made [fol. 90] one of its freight stations was the particular railroad freight station to which he wished his goods to be forwarded. In point of fact, the sending it in care of the warehouse amounted to nothing more than if a shipper marked his freight "in care of John Doe, Pennsylvania, freight agent at Bryn Mawr, Pennsylvania." To our view, the finding of the Commission that this marking made the warehouse the consignee of the freight had not only no proof to support it and is not a finding of fact, but is a mere conclusion or inference for drawing which there was no warrant or foundation. And, to our view, the upholding of this theory of imaginary consigneeship of the freight would deprive consignors of freight of one of the most valuable rights a shipper has in surrendering the custody of his freight to a public carrier, namely constituting the carrier as his agent—with the consequent right of transit stoppage, until the carrier has terminated such agency by delivering such goods to the consignee designated by the consignor. Moreover, to so hold is to ignore the fact that the consignor has named the consignee and has mentioned the warehouse not as the consignee but as one in whose care the shipment is made. The bill of lading must be construed as a whole and every part given effect and to say the name of the designated consignee which is written into the bill of lading is to have no effect because the warehouse, which is not named as consignee, is to be "deemed" the consignee because of the words "In care of", etc., is to violate a basic rule of construction and to substitute fiction for fact.

Indeed, the holding of the Commission can hardy be deemed a finding of fact for it only is

"The contract warehouses, even though not the owners of the goods, have been given dominion over such goods for [fol. 91] transportation purposes, and accordingly for transportation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses."

Being merely a deduction, this Court is at liberty to draw its own deductions and base its decree on its own view (See 17 Fed. (2d) 22, and 18 Fed. (2d) 483, where it is said:

"When the fact is merely a deduction from other facts reported by him (Master) his conclusion is simply a result of reasoning of which the court is as competent to judge as he."

In point of fact, the warehouse is simply the railroad so far as the owner of the goods is concerned, for the uncontradicted proof is:

"We always receive the instructions, either from the carrier or from the owner of the merchandise. These instructions are received by messenger, by mail, by telegraph or by telephone, to be confirmed in writing."

Such conduct on the part of the warehouse was in compliance with the contract which, as we have quoted earlier, provided that the contract should not be so construed "as to interfere with the performance by the Railroad Company of all obligations imposed upon it by law in respect to the carriage, storage or delivery of traffic."

Moverover, the inference of the Commission that the warehouse "for transportation purposes should be deemed * * * consignee of shipments to its warehouses" is authoritatively negative by the Bills of Lading Act, 39 Stat. 545, Sec. 42, which provides "consignee" means the person named in the bill as the person to whom delivery [fol. 92] is to be made. It will also be noted that the present holding of the Commission that the warehouse has "been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed consignors and consignees," is at variance with the principle announced by its own holding in Smokeless v. Norfolk, 85 I. C. C. 395, which said: "The law seems to be well settled that the party to whom a shipment is consigned is the legal consignee, and not the party in whose care the goods are shipped." This reasonable and common sense view has the approval of text book authorities. See Hutchinson on Carriers, 3rd Edition, Vol. 2, page 755, where it is said:

"Goods shipped to one person as consignee in care of another should be delivered to the consignee, and, in case he cannot be found then to the one in whose care they are shipped."

It is obvious that a railroad by undertaking performance of transportation does not by performing such transportation duties become the consignee of the goods. And if such is the case, how does the hiring by the railroad of some one else to perform a part of the railroad's services make such minor performer the consignee where the same acts, if done by the railroad, would have no such effect.

Yet it is upon this false assumption of the warehouse being the consignee that this entire proceeding is bottomed. The Commission saw that the fact that the warehouse was the consignee was a prerequisite to their order and that unless such was the fact, the order here involved could not be sustained.

That the railroad may by contract constitute a warehouse a public freight station is as said by Supreme Court in United States v. Baltimore & Ohio Railroad, 231 U. S. 288, [fol. 93] "too clear for extended discussion."* If, then, such contract for substitution can legally be made, does it follow that because such a substitution is made with one warehouse and it is made a public freight station, that thereby the railroad has bound itself to establish as its

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*To the same effect is the case of the Terminal Warehouse v. U. S. 31 Fed. (2d.) 956, where Judge Soper says:

"The authorities do show, as the Commission held, that in certain cases it is proper for a shipper or forwarder of goods to be paid for transportation service rendered to a carrier. See Interstate Commerce Commission v. Diffenbaugh, supra, which was referred to in Lehigh Valley R. R. Co. v. United States, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839, as being an authority which went to the verge of what is permitted by the Act to Regulate Commerce. It is also well settled that a carrier has full liberty to select its own agents to perform transportation service on its behalf, which it is under legal obligations to perform, and that it may employ one agent exclusively, and refuse to employ another. Covington Stock-Yards v. Keith, 139 U. S. 128, 11 S. Ct. 461, 35 L. Ed. 73; Express Cases, 117 U. S. 1, 6 S. Ct. 542, 628, 29 L. Ed. 791; Chicago etc., R. R. v. Pullman Southern Car Co., 139 U. S. 79, 11 S. Ct. 490, 35 L. Ed. 97; Donovan v. Pennsylvania Co., 199 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192."

additional public freight stations all other warehouses in that vicinity? We think not, for, as said in 276 U. S. 518, "The grant of privileges to respondent creates no duty on the part of the railroad company to grant like privileges to others and therefore there is no legal discrimination." Indeed it would seem the mere state-[fol. 94] ment of the proposition is its own answer. Now if the railroad can legally contract with one warehouse to make it a public freight station and if thereby it does not obligate itself to make every other warehouse a public station, it follows that in consideration of the designated warehouse agreeing to become a public station, the railroad may lawfully agree that it will not make any other warehouse a public station. For it will be observed that no warehouse has any general right to demand it be made a public freight station, but that it can be made such only when it and the railroad contract it shall be made such freight station.

Commenting on the freedom of railroads to control its passenger stations, the Supreme Court, in 276 U. S. 194, said "There was no duty upon the petitioner (the railroad) to accord to other taxicab men, the use of its lands simply because it had granted Walsh the privilege specified in its contract with him." And in another case involving a similar question, the Supreme Court, in the same volume, at page 529, said: "There is here no complaint by or on behalf of passengers; no lack of service, unreasonable exaction or inconvenience of the public is shown. It would be unwarranted and arbitrary to assume that this contract is contrary to public interest. The grant of privileges to respondent creates no duty on the part of the railroad company to give like privileges to others, and therefore there is no illegal discrimination." Now, if such contract as here involved be made, if there be no sinister purpose in making it, if its performance be an aid to the railroad in the movement of freights, if the public can avail themselves of this added facility, and the warehouse in good faith performs [fol. 95] the part of the railroad in receiving and forwarding for all shippers alike their carload shipments, it would seem that such contracts and performance under them constitute a valuable and desirable aid to the railroad in the performance of its duty to transport.

Moreover, as under the contract all the service the warehouse performs as a public freight station, to wit, loading or unloading the freight, and the money paid for such service is reasonable in amount, such payment may properly be made.

That the warehouses were not only designated by contract as public freight stations, that they were held out as such on tariff schedules, but, over and above all that they in good faith act as public stations for carload lots, is conclusively shown by the proofs which, for example in the case of the Merchants, are that from January 1, 1928, to September 30, it received as agent from trucks and teams and forwarded on its principal's railroad seven hundred and forty-four carload lots of outbound freight. That as to this freight it did no storage service and got no pay. That it received no pay whatever from the shippers for loading and no pay from the railroad save the contract allowance. As to such shipments, the railroad performed no pre-transit service. It was all done for it by the warehouse. Notwithstanding such uncontradicted proof, the Commission inferred that the warehouse has "been given dominion over such goods for transportation * * * they should be deemed the consignors of shipments from * * * their warehouse." Fortunately, in the interest of actual facts, the giving of the name of consignee or consignor to such a warehouse does not make it such if in truth and verity it was not the consignor or the consignee.

In view of the fact that the shipper has never surrendered [fol. 96] his dominion, title to and control of his shipment and that the warehouse has never acquired any title to or control of the shipment, but that by contract and practice under the contract the shipment remains subject to the control of the railroad and the shipper, it seems clear that to decide these cases on any other basis than that of the absolute and unquestionable liability of the railroad to the shipper for his goods until the shipper's actual, designated consignee has received them from the railroad, is to bottom a decision on imaginary sand and not on the bedrock of actual fact. True, the warehouse may stand in a potentially secondary or dual status, but that secondary status as warehouseman for the consignee, can only arise after its primary status and duty, as the agent of the railroad, has

been fulfilled and ended. The two duties are successive, not conjoint. On the one hand, the warehouse is the exclusive agent of the railroad until the latter's transportation ends by delivery to the shipper's consignee. On the other hand, the warehouse can only become the consignee's agent and the custodian for the consignee when the named consignee chooses to accept the freight from the railroad's agent and the custodian for the consignee when the named the transporting railroad and as custodian for the consignee, is a tandem and not an abreast relation. Indeed, as we sense this case, the decisive question is whether these warehouses were in good faith made public freight stations by the railroad and whether the warehouses have honestly and in good faith and reality acted as public freight stations in the receipt of outgoing and the delivery of incoming freight. That test was clearly pointed out and made the decisive factor in the Baltimore case (Terminal Warehouse [fol. 97] Co. v. U. S., 31 Fed. (2d) 951.) A study of that case shows that the warehouses were designated in the tariff sheets as public freight stations, but in the proofs it was shown in that case, as Judge Soper says, "that the terminal warehouses, though nominally open to the general public, are in fact confined to the receipt and forwarding of merchandise concerning which the Terminal is employed to render some warehouse service." In other words, the railroads and warehouses in that case compelled the shipper to submit to the warehouse storage charges if he used the station. In the present case no such condition exists. The shipper simply ships and the warehouse simply receives and forwards the freight thus received without compelling any, or even contracting for any, precedent storage. In the present case any outbound shipper desiring storage or shipment, if he so desires, and any shipper not desiring warehouse facilities may use the warehouse simply as a freight station. That the Baltimore case was decided on facts radically different from the crucial facts in this case is clear from Judge Soper's language, on page 957:

"The contention of the Terminal Warehouse Company is that the Commission's order is wrong, because the Warehouse Company has been designated in the tariff as a public station of the carrier, and hence in this place the carrier is obliged, under the exception to rule 27, to load and unload

carload freight, and may employ and pay the Terminal as its agent to do the work. But the conclusion to which the Commission came destroys the essential premise upon which this argument is based; for it found that the Terminal Warehouses, although nominally open to the general public, are in fact confined to the receipt and forwarding of merchandise concerning which the Terminal is employed to ren- [fol. 98] der some warehouse service. We are bound by this conclusion of fact, if it is supported by substantial evidence. Anchor Coal Co. v. U. S. (D. C) 25 F. (2d) 462, 471. In our opinion, the evidence not merely supports, but requires, the conclusion which the Commission has reached. It is true that 20 per cent. of all carload package freight, shipped to Baltimore over the Pennsylvania, is handled by the Terminal Warehouse, and that any shipper, desiring warehouse facilities, may send his goods to its platform. But these circumstances do not constitute the warehouse a public station. It is not used by shippers or consignees, who do not require or desire the services of the Terminal Warehouse Company, and either do not make use of any warehouse, or send their goods to other warehouses of a private or public character. The distinction between the situation and that in the case of U. S. v. Baltimore & Ohio Railroad, 231 U. S. 274, 34 S. Ct. 75, 58 L. Ed. 218, upon which the complainant relies, is obvious; for there the premises used by the carrier as a freight station, although furnished and operated by a nearby shipper, who used it to a greater extent than any other shipper, was nevertheless open to all shippers and actually used for the benefit of all alike."

We have already noted some of the facts in reference to the use of these warehouses as public freight stations and reference is further made to the fact that 35% at some of the contract warehouse stations and 75% at others were delivered to the actual consignees within the forty-eight hours of free time and were not warehoused at all. At the Pennsylvania Warehousing Stations from 40 to 60% of incoming freights were taken away without being stored, and at the Philadelphia Warehouse and Cold Storage Sta- [fol. 99] tions 80% were so taken. These warehouses being then in truth and in fact used by the public and the railroads as public freight stations, it seems to me that

the Baltimore case is an authority in favor of the warehouses and not of the Interstate Commerce Commission. Summarizing my view, I would vacate the order of the Commission.

[fol. 100] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Equity

No. 5781. No. 5789. No. 5791

MERCHANTS WAREHOUSE COMPANY et al.

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION

Before Buffington, Circuit Judge, and Thompson and Dickinson, District Judges

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed Nov. 5, 1930

Findings of Fact

THOMPSON, District Judge:

1. The plaintiff warehouses and the complainants before the Commission, who are intervening defendants in this proceeding, operate at Philadelphia warehouses, at and from which they ship and receive, load, unload, store, distribute, and deliver in small quantities carload lots of merchandise, known as "package freight", carried or to be carried at carload rates, which they have previously solicited for such handling from their customers located generally in cities outside of Pennsylvania. For those services they collect from their customers certain warehouse rates and charges.

2. In all the larger cities, including Philadelphia, public warehouses are customarily used for the receipt, storage, and distribution of merchandise. These warehouses perform an important public service. The merchandise warehouse receives goods in carloads and distributes them in

smaller quantities to local jobbers or retailers, or re-ships them in less-than-carload lots to near-by destinations; issues negotiable and non-negotiable receipts, provides insurance, and allows credit to be obtained on merchandise stored; provides recoopering, marking, and separation of [fol. 101] varieties, and various incidental clerical services. Warehouse services enable manufacturers to keep spot stocks for their customers; equalize production by steadily absorbing the manufacturers' output while eliminating heavy investment in reserve storage space; reduce freight charges and save time in transit through handling goods in carload quantities; reduce fire risk and loss and damage claims; and eliminate the necessity of providing storage space at point of origin.

3. The plaintiffs in the instant case operate, in competition with the intervenors, who were complainants before the Commission, the same type of warehouses and render the same kind of services generally as the intervenors, for which charges are collected from their customers.

4. The carriers, the Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, and the Reading Company, pay to the plaintiffs, in connection with the loading, unloading, and "handling" by them of such merchandise, certain sums, ranging from 30c to 50c per ton, but make no such payments to the warehouses which were complainants before the Commission. No payments are made if the shipments are unloaded within the forty-eight hours free time. The Pennsylvania Railroad Company pays the allowances in question to the Merchants Warehouse Company and the Quaker City Cold Storage Company, the Baltimore and Ohio to the Pennsylvania Warehousing and Safe Deposit Company, and the Reading Company to the Philadelphia Warehousing and Cold Storage Company, the plaintiffs here. Payments are also made by the Reading to the Pennsylvania Warehousing and Safe Deposit Company.

5. In some instances, the carriers own the land or warehouses which the plaintiffs hold under lease. In other in- [fol. 102] stances, the carriers do not own the land or the warehouses.

6. The contracts provide that the warehouse shall accord to traffic passing over the lines of the carrier preference in facilities furnished by the warehouse over traffic passing over other lines; shall load or unload or handle freight received to be shipped over the lines of the carrier, or received by the warehouse from the carrier for delivery to consignees; shall notify the consignees of the arrival of incoming freight; shall be responsible for the prompt collection of freight charges and other charges upon in-bound freight; shall indemnify and hold harmless the carrier for all damage to and all loss of freight in the custody of the warehouse; shall maintain fire insurance; shall notify the carrier of the failure of consignees to receive freight; shall comply with directions with respect thereto received from the carrier; shall indemnify the carrier against liability on account of any of the warehouse's acts of omission and on account of bills for merchandise issued by the warehouse.

7. The terminal services of the contract warehouses include the removing and recording of the seals from the cars placed for unloading, placing seals on loaded cars and preserving the record thereof, examining the merchandise, noting the damage and the cause thereof, the prompt inspection of the equipment, prompt loading and unloading to minimize delay, storing the shipment for the forty-eight hours free time, including protection against fire through insurance, taking up bills of lading and canceling the same, delivering the merchandise to the consignee and taking receipts therefor, handling claims for damage, disposal of refused merchandise, executing bills of lading for outbound shipments, tallying the contents of the cars.

8. The contract warehouses and the intervening ware- [fol. 103] houses are engaged in the same kind of business, and each ships and receives at its warehouses package freight of all kinds destined to or shipped from various points in the United States over the railroads, and the circumstances and conditions surrounding handling and movement of the traffic are similar if not identical.

9. The services which the contract warehouses perform, for which the contracts provide for the payment of compensation by the carrier to them, are performed, for their patrons, by the intervening defendants who were complainants before the Commission; the latter load and un-

load the freight for their patrons, pay and collect freight charges, send notices of arrival to their customers, check the contents of the cars, give the railroads reports, notify the railroads of damage to the freight, prepare bills of lading, mark and stencil packages, recooper and perform in general identical services for their patrons.

10. The warehouses of the plaintiffs and those of the intervenors are served by private side tracks or sidings connecting with the lines of one or more defendants.

11. Both handle the same classes of freight and both obtain business by widespread advertising in prominent trade publications by sending letters, pamphlets, and circulars to prospective customers offering them their services, and by personal solicitation.

12. There is active and keen competition between complainants and the contract warehouses.

13. Concerns using public warehouse facilities generally select the company offering them the lowest aggregate charge for the distribution of their goods. By means of the allowances the contract warehouses are able to quote lower [fol. 104] charges than can the intervenors.

14. The contract warehouses are compensated for the solicitation of freight for movement over the lines of the respective defendants through the payment of the allowances in question.

15. Traffic considerations have been the primary motive for the payment of these allowances.

16. The facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact open public stations, but are confined to the handling of merchandise for the patrons of the warehouses.

17. The services performed by the contract warehouses in connection with the loading or unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are in fact performed for the benefit of the owner of the merchandise rather than for the railroads.

18. The service rendered by the warehouses under the contracts is a trade service and not a transportation service.

19. While the contract warehouses are not the owners of the goods received or shipped by them, all of the dealings are with these warehouse companies, and none with the owners of the goods.

20. As to many of the inbound carload shipments, the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less-than-carload lots.

21. The contract warehouses, even though not the owners of the goods, have been given dominion over such goods for [fol. 105] transportation purposes, and accordingly for transporation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses. The same is true as to the intervening warehouses, shipments from and to their warehouses being handled in substantially the same manner.

22. The Pennsylvania Railroad and the Baltimore and Ohio Railroad have made provisions in their tariffs by which they take upon themselves the service to consignors and consignees of loading and unloading carload package freight carried at railroad rates.

23. Rule 27 of the official Consolidated Freight Classification, to which the carriers are parties, provides as follows:

"Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at carload ratings."

24. The Pennsylvania Railroad and the Baltimore and Ohio Railroad provide in their tariffs by exceptions to Rule 27 that they agree to load or unload carload package freight at certain Philadelphia freight stations, included among which are the contract warehouses.

25. The Reading Company has no such tariff provisions.

26. The practice of plaintiffs in making allowances to the contract warehouses in connection with the loading or

unloading of package freight at Philadelphia as aforesaid and refusing to make similar allowances to intervenors for performing similar services results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants.

27. These contracts for the payment of the allowances [fol. 106] are devices to attempt to lend legality to the payment of rebates to the contract warehouses.

Conclusions of Law

1. The payment of the allowances by the railroads, in accordance with the contracts, is unlawful in that it subjects the intervening warehouses to unjust discrimination as against the contract warehouses.

2. The payment of the said allowances gives an undue and unreasonable preference and advantage to the contract warehouses and subjects the intervening warehouses to an undue and unreasonable prejudice and disadvantage.

3. The allowances paid to the contract warehouses are unlawful as rebates.

4. The order of the Interstate Commerce Commission of September 28, 1929, is in all respects a lawful order.

5. The petitions should be dismissed.

[fol. 107] In United States District Court, Eastern District of Pennsylvania

In Equity

No. 5781

The Merchants Warehouse Company, Petitioner,

vs.

United States of America and Interstate Commerce Commission, Respondents

No. 5789

The Pennsylvania Warehousing and Safe Deposit Company, Petitioner,

vs.

United States of America and Interstate Commerce Commission, Respondents

No. 5791

The Philadelphia Warehousing & Cold Storage Company, Petitioner,

vs.

United States of America and Interstate Commerce Commission, Respondents

Exceptions to the Findings of Fact and Conclusions of Law—Filed Nov. 19, 1930

And now, to wit, this 18th day of November, 1930, the Petitioners, The Merchants Warehouse Company, The Pennsylvania Warehousing and Safe Deposit Company and The Philadelphia Warehousing & Cold Storage Company except to the Findings of Fact and Conclusions of Law of the Court.

1. The Court erred in Finding of Fact Number 1. The said Finding of Fact is as follows:

* * * * * * *

[fol. 108] 2. The Court erred in Finding of Fact Number 4. The said Finding of Fact is as follows:

. . . . . .

3. The Court erred in Finding of Fact Number 8. The said Finding of Fact is as follows:

. . . . . .

4. The Court erred in Finding of Fact Number 9. The said Finding of Fact is as follows:

. . . . . .

[fol. 109] 5. The Court erred in Finding of Fact Number 10. The said Finding of Fact is as follows:

. . . . . .

6. The Court erred in Finding of Fact Number 13. The said Finding of Fact is as follows:

. . . . . .

7. The Court erred in Finding of Fact Number 14. The said Finding of Fact is as follows:

. . . . . .

8. The Court erred in Finding of Fact Number 15. The said Finding of Fact is as follows:

. . . . . .

9. The Court erred in Finding of Fact Number 16. The said Finding of Fact is as follows:

. . . . . .

[fol. 110] 10. The Court erred in Finding of Fact Number 17. The said Finding of Fact is as follows:

. . . . . .

11. The Court erred in Finding of Fact Number 18. The said Finding of Fact is as follows:

. . . . . .

12. The Court erred in Finding of Fact Number 19. The said Finding of Fact is as follows:

. . . . . .

13. The Court erred in Finding of Fact Number 20. The said Finding of Fact is as follows:

* * * * * * *

14. The Court erred in Finding of Fact Number 21. The said Finding of Fact is as follows:

* * * * * * *

[fol. 111] 15. The Court erred in Finding of Fact Number 26. The said Finding of Fact is as follows:

* * * * * * *

16. The Court erred in Finding of Fact Number 27. The said Finding of Fact is as follows:

* * * * * * *

17. The Court erred in Conclusion of Law Number 1. The said Conclusion of Law is as follows:

* * * * * * *

18. The Court erred in Conclusion of Law Number 2. The said Conclusion of Law is as follows:

* * * * * * *

19. The Court erred in Conclusion of Law Number 3. The said Conclusion of Law is as follows:

* * * * * * *

20. The Court erred in Conclusion of Law Number 4. The said Conclusion of Law is as follows:

* * * * * * *

21. The Court erred in Conclusion of Law Number 5. The said Conclusion of Law is as follows:

* * * * * * *

[fols. 112 & 113] Allen S. Olmsted, 2nd, M. Hampton Todd, Attorneys for The Merchants Warehouse Company, Petitioner. H. Edgar Barnes, Attorney for The Pennsylvania Warehousing & Safe Deposit Company, Petitioner. John P. Connelly, Attorney for The Philadelphia Warehousing & Cold Storage Company.

[fol. 114] IN UNITED STATES DISTRICT COURT

No. 5781

[Title omitted]

PETITION FOR ORDER STAYING THE ENFORCEMENT OF THE ORDER OF THE INTERSTATE COMMERCE COMMISSION PENDING APPEAL—Filed Nov. 5, 1930

Now comes the Merchant Warehouse Company, the Petitioner above named, by its attorneys Allen S. Olmsted, 2nd, Esquire and M. Hampton Todd, Esquire, and respectfully moves the Court to enter an order as part of its Final Decree in this case or contemporaneous with that Final Decree, staying and suspending the order of the Interstate Commerce Commission in the matter of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey and Terminal Warehouse Company vs. Pennsylvania Railroad Company, pending the perfecting and determination of an appeal to the Supreme Court of the United States and for reasons thereof respectfully represents:

1. On October 8th, 1930 this Court acting through Judges Thompson and Dickinson, filed an opinion announcing that [fol. 115] the bill would be dismissed. Judge Buffington filed a dissenting opinion.

2. Petitioner, being advised that it has the right under the statutes to appeal the dismissal of its bill to the Supreme Court of the United States, purposes to exercise that right promptly after the entry of the Decree dismissing the bill.

3. If the order of the Interstate Commerce Commission shall become effective upon the entry of the Decree dismissing the bill and if upon the appeal the Supreme Court of the United States finds that the order of the Commission should be enjoined, then the Petitioner would be irreparably damaged in the following particulars, to wit:

(a) The contracts which the Commission have held to be illegal involve the performance of a large amount of services by your Petitioner for which services Petitioner is entitled under its contracts to renumeration in a sum aggregating approximately $150,000 per annum. If the order

of the Commission goes into effect temporarily and the carriers do not permit the complainants to perform the services in question, the Petitioner will have no adequate remedy at law against the carriers in that it will be unable to prove what services would have been performed if the contract had remained in effect, and how much its profits would be for the rendition of said services.

(b) The order of the Interstate Commerce Commission requires the defendant, Pennsylvania Railroad Company, to cancel the provisions of its tariff which name Petitioner's warehouses as public freight houses and which [fol. 116] provide that car load package freight will be loaded or unloaded by the carrier at such stations. The defendant and the Commission take the position that in the absence of such tariff provision the payments to your petitioner for loading and unloading freight at such stations so designated would be unlawful. If the said provisions are cancelled, this Statutory Court could not compel the defendant to restore them to its tariff nor could the Supreme Court of the United States. The Interstate Commerce Commission could do so, if at all, only upon complaint and answer, the hearing of which would consume a year or more. Even if a Court of general equity jurisdiction on a suit by the Petitioner against the Railroad Company specifically to enforce its contract with the Railroad Company providing for the rendition of such services and the payment thereof, could and would compel the Railroad Company to republish its tariffs, the prosecution of such a proceeding in equity would involve unwarranted delay and expense. Temporary effectiveness of the Interstate Commerce Commission's order would therefore irreparably injure the Petitioner's rights under its contracts with the Pennsylvania Railroad Company.

(c) The merchants of Philadelphia and others who now receive freight at the Petitioner's warehouses or ship freight from its warehouses, would suffer irreparable damage. In some cases there are contracts of purchase or sale entered into on the faith of the undertaking of the carrier to load or unload package car load freight as part of the services rendered under the freight rate and the said con- [fol. 117] tracts of purchase or sale are at prices which do not contemplate loading or unloading by the shipper or

consignee at his own expense. The payment of such loading and unloading costs could not be recouped by the said merchants either from the purchasers or sellers or from the Railroad Company. In the case of contracts for purchase or sale to be made during the months while this case is pending in the Supreme Court, the uncertainty as to who will have to bear the costs of loading and unloading will be an upsetting factor, a great disturbance to the market and a detriment to the business of the merchants of Philadelphia.

(d) The system of handling package car load freight at Philadelphia enjoined by the Commission's order has been in effect here for forty years. The channels of business have adapted themselves to that arrangement. The abolition of the arrangement will be a severe blow to the business of Philadelphia, a fact recognized it is believed in both the majority and minority opinions of this Court. If the order of the Commission is suspended on appeal, the business community of Philadelphia will as pointed out in the majority opinion, have to adapt itself to the new conditions at whatever cost, but if the order is not sustained on appeal, a great loss will have been sustained by the business community without advantage to anyone and without warrant in law.

(e) The warehouses, complainants before the Commission, would not be injured by staying the Commission's order. In its opinion the Interstate Commerce Commission refused to award damages to the complaining warehouses, on the ground that they had failed to prove dam- [fol. 118] ages, but under date of August 23, 1930, they filed a new complaint with the Interstate Commerce Commission, Docket No. 33790 praying for an award of damages to them on account of the alleged violations of the Interstate Commerce Act. The said Complaint, a copy of which is attached hereto and made a part hereof, marked "Exhibit A" was received by the Commission. The Respondent therein, the Pennsylvania Railroad, is a solvent corporation able to pay damages for all injuries sustained by the complaining warehouses during the period while this appeal is under consideration by the Supreme Court.

(f) Putting the order into effect for a period of months (as contrasted with putting it permanently into effect)

would be of no advantage to the complaining warehouses. The Commission's order does not require the payment of any sums to them. The competitive advantage they would gain in their competition with the petitioning warehouses would not be great because there would not be time especially in view of the uncertainty as to the ultimate disposition of the case, to advertise, solicit and contract for additional business. The advantages which the complaining warehouses seek will accrue in a greater ability to rent their premises and to make other long time contracts for the handling of freight which advantages could not be gained in a period of months of uncertainty. On the contray, the disadvantage experienced by the entire business community because of the temporary upsetting of a long course of trade, would be reflected in an injury to the business of the complaining warehouses.

[fol. 119] Wherefore your petitioner prays that the order of the Interstate Commerce Commission be stayed and suspended pending the perfecting and determination of the appeal to the Supreme Court of the United States.

Your petitioner furthermore prays leave to introduce evidence before this court tending to show that irreparable damage would be done to the Petitioner if the order of the Interstate Commerce Commission be not stayed pending the appeal to the Supreme Court of the United States.

And your petitioner will ever pray, etc.

Allen S. Olmsted, 2nd, M. Hampton Todd, Attorneys for Petitioner.

[fol. 120] EXHIBIT "A" TO PETITION FOR STAY

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 23790

JAMES GALLAGHER, NORTHEASTERN WAREHOUSE COMPANY, WALTER A. BAILEY, TERMINAL WAREHOUSE COMPANY, Complainants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant

Complaint

This complaint of the above-named complainants respectfully shows:

I

(a) That on April 26, 1928, the said complainants filed their formal complaint with the commission and that that complaint was docketed under the number 20968; that after public hearing on that complaint the commission, division 3, on December 28, 1929, 160 I. C. C. 563, issued its report and order and therein found that the defendant carrier had violated sections 2 and 3 of the Interstate Commerce Act; that in that report division 3 denied reparation and further hearing on reparation to the complainants; and that by their petition of February 26, 1930, the complainants seek further hearing in the matter of reparation.

(b) That operation of said order of the commission is temporarily stayed and suspended by order of the District Court of the United States, Eastern District of Pennsylvania, (Judges Buffington, Thompson and Dickinson,) of April 15, 1930, and said order is thereby suspended until the further order of said court.

[fol. 121] (c) That the said complainants, for the purpose of protecting their claims for reparation from being barred by the statute of limitations and for the purpose of establishing their statutory rights to recover repara-

tion for damages suffered at the hands of the defendant carrier, as alleged herein, now file this formal complaint.

(d) That the complainants file this complaint in compliance with the letter of the commission's Secretary addressed to complainants' attorney, under date of May 20, 1930, in which the commission required the filing of a new complaint in lieu of the supplemental complaint which was filed by the complainants on April 23, 1930.

II

(a) That during the period of time from April 25, 1928, to the date of the filing of this complaint James Gallagher, complainant herein, trading and doing business under the name and style "Gallagher's Warehouses," had a general office at No. 50 South Third Street in the city of Philadelphia in the State of Pennsylvania and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(b) That at said times the Northeastern Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Sedgly and Erie Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

(c) That at said times Walter A. Bailey, complainant herein, trading and doing business under the name and style "Bailey Warehouses," had a general office at Delaware Avenue and South Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his [fol. 122] said warehouse business.

(d) That at said times the Terminal Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Delaware and Fairmount Avenues in said

Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

III

That at said times the Pennsylvania Railroad Company, the defendant, was a corporation organized under the laws of Pennsylvania and was a common carrier engaged in the transportation of property wholly by railroad, for hire, between said Philadelphia, a point on its railway route, and various points outside the state of Pennsylvania, and, as such common carrier, was subject to the provisions of the Interstate Commerce Act.

IV

(a) That at said times the Merchants Warehouse Company, Inc. was a corporation organized under the laws of said Pennsylvania; had a general office at No. 10 Chestnut Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia and competed with each of the complainants in carrying on its said warehouse business.

(b) That at said times The Quaker City Cold Storage Company, Inc. was a corporation organized and existing under the laws of Pennsylvania; had a general office at No. 211 Callowhill Street in said Philadelphia; occupied and used warehouses and warehouse facilities in said Philadelphia; conducted a warehouse business at said Philadelphia and in the conduct of that business competed with complainants.

(c) That, for convenience, said Merchants Warehouse Company and said Quaker City Cold Storage Company, Inc. collectively are referred to herein as the subsidized warehouse companies.

[fol. 123] V

(a) That during the period of time from April 25, 1928, to date of the filing of this complaint, herein called the

period of two years, each of the complainants and said subsidized warehouse companies in the conduct of his or its warehouse business, shipped numerous carloads, and smaller lots of property outbound from their warehouses in said Philadelphia to various points outside the state of Pennsylvania and tendered said property to defendant for transportation.

(b) That during said period of two yeafs each of the complainants and said subsidized warehouse companies, in the conduct of his or its warehouse business, caused numerous carloads, and smaller lots, of property to be shipped from various points outside the state of Pennsylvania to said Philadelphia and to be delivered to them by the defendant at their warehouses in said Philadelphia.

(c) That during said period the defendant and its connecting lines transported said property, for hire, in interstate commerce between said warehouses in Philadelphia and said points outside the state of Pennsylvania.

(d) That said property which defendant transported for complainants was similar to the property which defendant transported for said subsidized warehouse companies and the defendant performed said transportation services contemporaneously and under substantially similar circumstances and conditions.

VI

(a) That at various times during said period of two years the defendant gave allowances of 50 cents per ton and of other amounts per ton to said subsidized warehouse companies out of its published freight rates for said transportation of said property to and from warehouses of said subsidized warehouse companies.

(b) That certain of said allowances are referred to in defendant's published tariff bearing the number G. O. ICC No. 14400.

[fol. 124] VII

(a) That at the times the defendant transported the property, as alleged in Paragraph V above, the defendant charged, collected and received its filed and published rates

applicable to said transportation service and, later, at various times, the defendant, by the means of the allowances, special rates, rebates, drawbacks and concessions, as alleged in Paragraph VI above, which were devices used for the purpose of facilitiating violations of sections 2 and 3 of the Interstate Commerce Act, refunded and remitted to said subsidized warehouse companies part of the defendant's said filed and published rates which were lawfully applicable to said transportation of property performed by defendant for said subsidized warehouse companies.

(b) That through and by means of said devices the defendant transported said property for said subsidized warehouse companies at net rates which were materially less than its filed and published rates which it charged and collected for similar transportation of property for complainants.

VIII

That by reason of the facts stated in the foregoing paragraphs complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are unjustly discriminatory in violation of section 2 of said act, and, unduly perferential of said subsidized warehouse companies, competitors of complainants, and unduly prejudicial to complainants in violation of section 3 of said act. That each of the complainants has been injured thereby to his or its damage in a large sum of money.

IX

Wherefore complainants pray that defendant may be required to answer the charges herein; that after due hearing and investigation the commission find that said act has been violated as stated in Paragraph VIII above and [fols. 125 & 126] that an order be made commanding said defendant to pay to each of complainants by way of reparation for said damage, and, for additional damage arising from similar unlawful conduct of defendant during the prosecution of this case, such sum of money as, in view of the evidence to be adduced herein, the Commission shall determine that each of the complainants is entitled to as

an award of damages, with interest, under the provisions of said Act for violation thereof and that such other and further order or orders be made as the Commission may consider proper in the premises.

James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, Terminal Warehouse Company, Complainants, by John J. Hickey, 800 Southern Building, Washington, D. C., Attorney for Complainants.

Dated at Washington, D. C., August 23, 1930.

[fol. 127] IN UNITED STATES DISTRICT COURT

In Equity, No. 5781

[Title omitted]

ANSWER OF UNITED STATES TO PETITION FOR STAY OF ORDER OF INTERSTATE COMMERCE COMMISSION PENDING APPEAL—Filed Nov. 17, 1930

United States, one of the above-named respondents, for answer to the petition filed herein against it for an order from this Court staying the enforcement of the order of the Interstate Commerce Commission pending the petitioner's proposed appeal to the Supreme Court of the United States, says:

I

United States admits the allegations of paragraph numbered 1 of the petition.

II

For answer to paragraph numbered 2 of the petition, United States says that Urgent Deficiencies Act (38 Stat. 219) provides for a direct appeal to the Supreme Court of the United States from a final decree of a specially-constituted District Court in a suit to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission; but United States has no knowledge of petitioner's purpose to prosecute an appeal in this case.

[fol. 128] III

For answer to paragraph numbered 3 of the petition, and the several subdivisions thereof, United States denies that petitioner will suffer irreparable damage or any other legal injury if the order of the Interstate Commerce Commission becomes effective pending an appeal of this case to the Supreme Court of the United States; and for further answer to the said subdivisions, seriatim, of said paragraph numbered 3, United States says:

a. Section 15 (13) of the Interstate Commerce Act provides petitioner a clear, adequate, and complete remedy for collection from the carriers of any compensation to which it may be legally entitled for the performance of any transportation service rendered by petitioner in connection with the interstate transportation of any of its shipments; and United States further says that even assuming, as suggested in said subdivision (a), that the carriers do not permit petitioner to perform any transportation service in connection with its shipments during the period of the appeal to the Supreme Court, no legal injury could result to petitioner for the reason that it will have performed no service for which it may legally be compensated; and United States further says that if the Supreme Court should hold that petitioner is legally entitled to compensation from the carriers for performing the services in question, its right rests not upon the contracts but upon the provisions of said Section 15 (13) of the Interstate Commerce Act, and the remedy so provided may be invoked by it regardless of the provisions or the existence of said contracts. Petitioner's private contract rights are not, and can not be made an issue in this suit, nor a ground for granting the stay sought by petitioner.

b. United States says that while the order of the Commission requires cancellation of the tariffs as alleged in sub-
[fol. 129] division (b), it does not, as it could not, require that the contracts be cancelled, nor does it make any other requirement with respect to said contracts; and United States further says that nothing in the Commission's order prevents the carriers from permitting petitioner to perform, or prevents petitioner from performing, the loading and unloading service upon cars consigned to or from its warehouses pending appeal; and if the Supreme Court

should hold said service to be those for performance of which petitioner is lawfully entitled to receive compensation, petitioner may compel payment thereof under said Section 15 (13), in the improbable event the carriers refuse to make such payments voluntarily with respect to shipments handled during the appeal as well as those to be handled thereafter.

c. United States denies that "the merchants of Philadelphia and others who now receive freight at the petitioner's warehouses or ship freight from its warehouses, would suffer irreparable damage", unless the Commission's order be stayed pending appeal as alleged in said subdivision (c). Further answering said subdivision, United States says that the Commission's order leaves the carriers free to continue loading and unloading carload shipments for the merchants of Philadelphia and others upon the public team tracks, or delivering tracks of those carriers, and that the order does not prevent the merchants of Philadelphia or others from receiving and accepting said loading and unloading services free of charge from the carriers upon the latter's own tracks; nor does the order prevent the carriers from paying allowances to shippers for loading and unloading carload shipments on the carriers' public delivery tracks. United States further says that the facts found by the Court show that the allowances, characterized by the Court as unlawful rebates, are not paid by the carriers to the merchants of Philadelphia, and that their only possible benefit, if any, therefrom is indirect in that it depends upon whether or not petitioner reduces its [fol. 130] warehouse rates to such of said merchants as are its customers to the extent of the allowances or any part thereof.

d. United States says that the allegations contained in said subdivision (d) are based entirely upon speculation and are not susceptible to proof; and denies that any facts of record support the assumption that the freight rates of all the merchants in Philadelphia will be automatically increased by the amount of the rebates, and says that the facts of record show that the operators of the several non-contract warehouses who serve a great number of Philadelphia merchants and who perform services identical to those performed by petitioner, and without the aid or

benefit of the rebates charge their customers approximately the same rates as those charged by petitioner. United States further says that the allegations of said subdivision (d) with respect to the alleged disarrangement and disruption of the channels or methods of business established as a result of the payment of the rebates are without foundation in and are contrary to the facts of record in that they assume that to deprive petitioner of the rebates will deprive petitioner's customers of the use of its warehouse trade services, whereas, the facts found by the Commission and by this Court establish that it is because petitioner's warehouses as well as those of the non-contract warehouses render a storage handling and distribution service that the merchants of Philadelphia and those located elsewhere avail themselves of the use of the warehouses, and United States denies that such use and availability of said warehouses will be minimized or affected in any way by enforcement of the Commission's order pending appeal.

e. United States denies that the non-contract warehouses who were complainants before the Commission would not be injured by staying the Commission's order pending appeal; and further denies that it lies with petitioner to prove [fol. 131] injury or lack of injury to said non-contract warehouses; and United States further says that even if the allegations of said subdivision (e) be true, the lack of injury to the non-contract warehouses constitutes no legal ground or showing sufficient to entitle petitioner to continue receiving rebates, the acceptance and receipt of which is a criminal offense in violation of the Elkins Act (34 Stat. L. 587, as amended 36 Stat. L. 1167, U. S. C. Tit. 49, Secs. 43, 47).

Further answering the last sentence of said subdivision (e), United States says that if as alleged in said paragraph the Pennsylvania Railroad Company is a solvent corporation able to pay said non-contract warehouses for all injuries sustained by them if the order be stayed pending appeal, it is equally solvent and able, and can be compelled under Section 15 (13) of the Interstate Commerce Act, to pay petitioner for all transportation services rendered by it during the period of appeal.

f. For answer to said subdivision (f), United States says that the Commission's order does not purport to give the

non-contract warehouses any "advantage" over petitioner, but shows on its face that it seeks to end the disadvantage under which those warehouses have labored as a result of the inequality and discriminatory treatment accorded them by the carriers as compared with petitioner; and that said non-contract warehouses obviously will continue to suffer a disadvantage and discrimination each and every day the enforcement of the Commission's order is delayed.

IV

Further answering the petition, United States says that both the Interstate Commerce Commission and this Court have found and concluded from the facts of record that the allowances constitute unlawful rebates; and says further that the receipt and acceptance by a shipper of rebates is made a criminal offense by the provisions of the Elkins Act mentioned above, and United States denies petitioner's [fol. 132] legal right to continue receiving the rebates or any part thereof. United States further says that inasmuch as it is established beyond question that there is substantial evidence to support the finding of the Commission and of this Court that the allowances constitute rebates, and that in view of the holding of the Supreme Court in Erie Railroad Company v. United States, 280 U. S. 98, that such finding is conclusive upon the courts when supported by substantial evidence, petitioner's prayer for a stay of the Commission's order pending appeal is nothing more than a request that this Court sanction, concur in, and approve the proposition that to meet the ends of justice and equity it is essential that petitioner be permitted to continue violating a criminal statute.

Wherefore, having fully answered, United States prays that the petition for a stay pending appeal be denied and for the entry of a decree by the Court dissolving the temporary injunction heretofore issued in this case and dismissing the petition.

(S.) Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brien, Assistant to the Attorney General. Paul Freeman, Acting United States Attorney.

[fol. 133] IN UNITED STATES DISTRICT COURT

In equity. No. 5781

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO PETITION FOR ORDER STAYING THE ENFORCEMENT OF THE COMMISSION'S ORDER PENDING APPEAL—Filed Nov. 14, 1930

The Interstate Commerce Commission, hereinafter called the Commission, respondent in the above-entitled suit, for answer to the petitioner's petition for a stay of the enforcement of the Commission's order pending appeal, respectfully presents, in opposition to said petition, that:

I

In the proceeding entitled James Gallagher et al. v. Pennsylvania Railroad Company et al., 160 I. C. C. 563, the Commission found that the payment of allowances to the so-called contract warehouses, including petitioner, and the withholding of such allowances to other warehouses in Philadelphia who complained to the Commission, (hereinafter called complainants), constituted unjust discrimination, undue preference of the contract warehouses and undue prejudice to the complainants, in violation of Sec-[fol. 134] tions 2 and 3 of the Interstate Commerce Act. The order of the Commission in said proceeding requires that said unjust discrimination and said undue preference and prejudice be removed by discontinuing the payment of said allowances. This court has sustained the validity of that order. Tto stay the operation of the order pending the appeal would, therefore, result in prolonging the existence, for a period of many months, of the aforesaid violations of the statute.

II

In said proceeding the Commission found that the allowances paid to the petitioner were rebates. This court has sustained that finding, its conclusions of law expressly holding that "the allowances paid to the contract warehouses

are unlawful as rebates." Therefore, to stay the Commission's order pending appeal would in effect constitute the sanctioning by this court of further payment of said rebates.

III

We deny that petitioner will suffer irreparable injury or any injury whatever by reason of the enforcement of the Commission's order, or by reason of the denial by this court of the petitioner's prayer for a stay of that order; that petitioner can not suffer legal injury by reason of the immediate cessation of the payment to it of the allowances, in view of the adjudication that such allowances are unlawful rebates; that petitioner may not set up any right which has for its basis and foundation the continuance of the payment to it of unlawful rebates; that petitioner can not possibly maintain a right to the continuance of the payment of rebates to it by a common carrier subject to the [fol. 135] Interstate Commerce Act. That statute, nor any statute, court decision, or rule of law, vests no right in petitioner to unlawful rebates, but, on the contrary, condemns and declares to be unlawful the payment of such rebates. Neither at law, nor in equity, may petitioner or any person set up a right to receive from a common carrier engaged in interstate commerce rebates condemned by the statute, declared in numerous court decisions to be contrary to public policy, unconscionable, and, under certain circumstances, a criminal offense under the Elkins Act (Act of February 19, 1903, 32 Stat. 847, as amended by the Act of June 29, 1906, 34 Stat. 584, U. S. Code, Title 49, chap. 2, sec. 41 (1) p. 1673.).

IV

This court expressly found, in its findings of fact numbered 14 to 18, both inclusive, that the contract warehouses are compensated for the solicitation of freight for movement over the lines of the respective defendants through the payment of the allowances in question; that traffic considerations have been the primary motive for the payment of these allowances; that the facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact open public stations,

but are confined to the handling of merchandise for the patrons of the warehouses; that the services performed by the contract warehouses in connection with the loading or unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are in fact performed for the benefit of the owner of the merchandise rather than for the railroads; that the service rendered by the warehouses under the con-[fol. 136] tracts is a trade service and not a transportation service. The Commission in its report made the same findings of fact. Inasmuch as the only evidence before this court bearing upon these matters was a certified copy of the evidence introduced before the Commission, it follows that the finding of these facts by the court was the same as and at once a finding that the Commission's findings of fact were supported by substantial evidence. The Supreme Court has repeatedly held that "any finding of fact by the Commission if supported by evidence is final and conclusive on the courts" (Keller v. Potomac Electric Power Co., 261 U. S. 428, 441-442; Interstate Com. Comm. v. Union Pacific R. R., 222 U. S. 541, 550; Interstate Com. Comm. v. Delaware, L. & W. R. R. 220 U. S. 235, 251-252; United States v. Erie R. R., 280 U. S. 98, 102, and cases cited). It must, therefore, be taken as settled that the petitioner performs no services for the carriers for which it is entitled to compensation, and, therefore, petitioner could have no remedy at law or in equity against the carriers on account of non-payment of the allowances in question during the pendency of any appeal which may be taken in this case.

V

But even if it be assumed arguendo that petitioner did perform transportation services, and if it be further assumed that the Supreme Court on appeal should hold the Commission's order invalid, still petitioner would not be without remedy to recover compensation for such services performed during the pendency of the appeal, but would have its remedy before the Commission under the provisions of Section 15 (13) of the Interstate Commerce Act, which provides:

[fol. 137] "If the owner of property transported under this Act directly or indirectly renders any service connected

with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, * * *"

Such remedy is clear, adequate and complete. In numerous cases the Commission has awarded reparation under the above provision of the statute. Petitioner admits in paragraph 3 (b) of its petition that the Commission has such jurisdiction. Therefore, petitioner can not in any event suffer damage that is irreparable by reason of the denial by this court of its petition for a stay of the Commission's order pending appeal.

VI

We deny that petitioner has the right to speak for the merchants of Philadelphia. We further deny that its petition, which seeks to set up that enforcement of the Cimmission's order will result in detriment to the business of the merchants of Philadelphia, does actually speak for the merchants of Philadelphia or for the City of Philadelphia as a whole, but speaks for petitioner and for petitioner's customers only. The Terminal Warehouse Company and the other five warehouse companies who were complainants before the Commission are lawfully engaged in business in the City of Philadelphia, operating a dozen or more warehouses, in competition with petitioner in the same kind of business, and these warehouse companies have numerous customers who are Philadelphia merchants. Obviously, petitioner does not speak for these business concerns of Philadelphia, nor take into consideration the detriment to [fol. 138] their business because of the payment of the allowances to the contract warehouses in the past and the probable continued payment of the same allowances during the pendency of the appeal if the stay prayed for is granted.

By reason of the receipt of the allowances, the contract warehouses have been able to fix subnormal warehouse

rates. The complainants, in order to compete with the contract warehouses, have been compelled to quote the same subnormal rates, but without the advantage of allowances with the result that complainants have suffered loss of legitimate business profits. When the order of the Commission requiring the discontinuance of the allowances takes effect, it is possible that the contract warehouses will increase their present subnormal warehouse rates up to a normal basis, and the complaining warehouses may do likewise. But we submit that if this should take place, it will not cause either the contract warehouses or their customers any legal injury nor constitute any detriment to their business of which they may legally complain. They are not entitled to subnormal warehouse rates made possible only through the granting of unlawful rebates to certain favored warehouses, a thing *ipso facto* illegal, doubly reprehensible because of the resulting discrimination against the complaining warehouses.

VII

The Commission's order requires that the Pennsylvania Railroad cease, desist and abstain from publishing or making allowances to the Merchants Warehouse Company in connection with the loading or unloading of package freight at Philadelphia, Pa., and further requires that said defendant cancel its tariff provisions which make the warehouses of said Merchants Warehouse Company a part of said defendant's station facilities at Philadelphia, Pa., but [fol. 139] the order contains no requirement that the Pennsylvania Railroad cancel its tariff provisions which provide that carload package freight will be loaded or unloaded by the carrier at its public freight stations. Hence, if any shipper or receiver of carload package freight in the City of Philadelphia wishes to ship or take delivery of such carload package freight through the public freight stations of the Pennsylvania Railroad Company, they have the legal right to do so. If, however, any member of the Philadelphia public wishes to obtain the special warehouse services afforded by petitioner, they are at liberty to contract with the petitioner to that end, and the Commission's order in no way attempts to regulate the amount of the petitioner's warehouse charges, but does require that the carriers cease

and desist from paying the allowances to the petitioner which have been found by the Commission and by the court to be unlawful rebates.

VIII

While it is true that the complainants have the right to petition the Commission for an award of damages under Section 16 (1) of the Interstate Commerce Act, still the burden of proof in such cases is heavy, complainant being compelled to submit definite proof of damage and the amount of the actual pecuniary loss, the measure of damages in such case (violation of Sections 2 and 3 of the Act) being that laid down in Penn. R. R. Co. v. International Coal Co., 230 U. S. 184, 206, and because of the difficulty of the proof, awards by the Commission under those sections have been rare. Moreover, even should complainants be able to prove and to recover the actual monetary loss, they will be unable in any event to recover losses actually sustained [fol. 140] which come within the category of remote and consequential damages which flow from a discrimination of this kind. Complainants have suffered, and until the Commission's order becomes effective will continue to suffer, incalculable and irreparable damage because of the discrimination.

Thus, if the operation of the Commission's order is stayed and the validity of the order is sustained by the Supreme Court, it will result that, even though the complainants should sustain the burden of proof placed upon them and recover the damages which the law allows sustained during the period of the pendency of the appeal, still complainants will not be made whole, for they will inevitably sustain irreparable losses and injury, whereas, on the other hand, if the stay should be denied and the Supreme Court should hold the Commission's order invalid, petitioner will have the right to prosecute its claim for reparation under Section 15 (13) of the Interstate Commerce Act and recover from the carrier full allowance for any transportation service it performed for the railroad.

We suggest that the latter alternative is the one far more likely to meet the demands of justice and fairness in respect of the conflicting interest here disclosed, because of the conclusion by this court, after mature deliberation, that

the Commission's order "is in all respects a lawful order," and the further fact that the validity of a similar order of the Commission was sustained by the specially-constituted three-judge court in the Baltimore case, Terminal Warehouse Company of Baltimore City v. United States et al., 31 Fed. (2d) 951.

[fols. 141 & 142] IX

Petitioner is not in a position to suggest that "putting the order into effect for a period of months (as contrasted with putting it permanently into effect) would be of no advantage to the complaining warehouses." It is obvious that the continuance of the allowances will be an advantage to the petitioner, and it seems indisputable that the removal of that advantage will be of benefit to the complainants. Complainants speak for themselves in this regard and they are now before the court praying that the Commission's order be allowed to become effective immediately. The purpose and intent of the order is not to give complainants any "advantage" but merely to put them on a plane of equality with their competitors in so far as treatment at the hands of common carriers is concerned, a consummation which the Interstate Commerce Act since its inception has contemplated and expressly required.

X

The Commission hereby prays that the said petition be denied and that final decree vacating and dissolving the temporary injunction and dismissing the bills for want of equity be entered.

Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, of Counsel.

[fol. 143] IN UNITED STATES DISTRICT COURT

In Equity. No. 5781\

[Title omitted]

ANSWER OF THE INTERVENING DEFENDANTS TO THE PETITION OF THE MERCHANTS WAREHOUSE COMPANY FOR AN ORDER OF THIS COURT STAYING THE ENFORCEMENT OF THE ORDER OF THE INTERSTATE COMMERCE COMMISSION PENDING APPEAL—Filed Nov. 10, 1930

James Gallagher, Northeastern Warehouse Company, Walter A. Bailey and Terminal Warehouse Company for answer to the petition of the Merchants Warehouse Company, say:

I

Answering paragraph 1 of the petition. We admit all that is alleged in paragraph 1.

Answering paragraph 2 of the petition. We deny the allegations in paragraph 2. Our position is that the petitioner has no right of appeal to the Supreme Court of the United States. The petitioner is claiming a right to collect compensation from the Pennsylvania Railroad Company under certain contracts or agreements in writing and to use the provisions of the act of June 18, 1909, C 309, 36 [fol. 144] Stat. 539, as amended by Urgent Deficiencies Act of October 22, 1913, C 32, 38 Stat. 208, 220, to enforce its alleged right. Such a suit on contract cannot be prosecuted under that statute. The railroad company, through refraining from participation in the case at bar, has manifested that it does not desire to pay that compensation. In the absence of the railroad company as a party to this suit the petitioner is without statutory authority to prosecute its alleged appeal further. Sprunt and Sons v. United States, 281 U. S. 249, decided April 14, 1930.

Answering paragraph 3 of the petition. We deny that the application or effect of the commission's order, upon vacation of the temporary stay granted by this court, will result in irreparable injury or any damage to the petitioner.

We submit the following in answer to each of the subdivisions of paragraph 3 of the petition.

Answering sub-paragraph (a). We deny the assertions in the petition that the contracts require the petitioner to perform service for the Pennsylvania Railroad Company. The petitioner did not offer evidence, at the public hearing before the commission, tending to show that the petitioner undertook to perform any service for the railroad company under the contracts or that the petitioner performed any such service. This court and the commission found that no such service was performed by the petitioner. This court, in its opinion of October 8, 1930, among other things, said:

"But there is substantial evidence to support the facts found by the commission that the warehouses of the plaintiffs are not in fact open public freight stations of the railroads; that the service rendered by them under the contracts is a trade service and not a transportation service, in that it was rendered by the contract warehouses and by the interveners, each for its patrons in precisely the same way; that thereby the plaintiffs are enabled to perform such service for their patrons for a lower charge than that for [fol. 145] which the interveners can perform the same service to their patrons.

It is clear that the payment of the allowances by the railroads under the contracts was not a consideration for employment in a transportation service."

Answering sub-paragraph (b). We deny the assertions that the petitioner will be subjected to irreparable injury. We submit that if and when the Supreme Court of the United States finds the contracts and allowances to be lawful then the petitioner can, in suit upon its contract, recover the aggregate of the allowances deferred awaiting that finding.

Answering sub-paragraph (c). In this sub-paragraph the petitioner assumes to state the rights of others, not named, in support of relief sought by the petitioner and to establish that the unnamed shippers may be subjected to irreparable injury. Absence of foundation relieves us of the necessity of discussing the allegations in this sub-paragraph. However, if petitioner's assertions are true it necessarily follows that irreparable injury will be inflicted upon the intervening defendants through further stay of the order of the commission which will enable the petitioner to use unlawful allowances and rebates in unfair competi-

tion enabling the petitioner to entice business from the intervening defendants.

Answering sub-paragraph (d). The so-called system of handling package carload freight at Philadelphia, that is, the allowance practice is not a general or reputable practice. A few selected warehouse companies receive the allowances and their numerous competitors and the shipping public generally, insofar as is evidenced in this case, do not receive such allowances or equivalent reductions of freight rates. The elimination of the unlawful rebating practice, which resulted to the benefit of a chosen few, will not injure the general public.

Answering sub-paragraph (e). The intervening defend- [fol. 146] ants would be subjected to irreparable injury through a further stay of the order of the commission. Under the Interstate Commerce Act they can claim only compensatory damages. Pennsylvania Railroad v. International Coal Company, 230 U. S. 184, 206. The intervening defendants can claim damages only on competitive business which they can obtain by reducing their compensation to the sub-normal basis which the petitioner is enabled, by the allowances, to impose upon all competitive warehouse trade. The intervening defendants cannot claim or recover damages for loss of business in instances where the sub-normal basis makes their solicitiation or quotations futile. And they cannot obtain reparation for the entrenched power in business circules gained by the petitioner through taking the benefit of the allowances for many months and years—every additional day of the allowances adding to that power.

Answering sub-paragraph (f). This sub-paragraph of the petition reflects a groundless effort of the petitioner to describe prospective business efforts of the intervening defendants and persons other than the petitioner and the future results thereof. Our answer to sub-paragraph (e) is our answer, and refutation, of sub-paragraph (f).

II

The commission found that the allowances were unlawful rebates. This court concluded that the giving of the allowances in question subjected the intervening defendants to unjust discrimination in violation of section 2 of the Interstate Commerce Act. It necessarily follows that

continuance of the giving of the allowances will consummate numerous willful violations of section 1 of the Elkins Act, a criminal statute. Every assertion, in the petition, of damage which may result to the petitioner from vacating the order of this court which temporarily stays operation [fols. 147 & 148] of the commission's order applies with equal force in establishing that irreparable injury will be inflicted upon the intervening defendants through further stay and suspension of that order.

III

Wherefore the intervening defendants, having fully answered the petition, pray that the petition be dismissed for want of equity at the cost of the petitioner and that this court forthwith enter its decree, in the form heretofore proposed by the United States, vacating and dissolving the temporary orders of this court entered on February 21, 1930, and April 15, 1930.

James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, Terminal Warehouse Company, Intervening Defendants. By John J. Hickey, John J. Hickey, 800 Southern Building, Washington, D. C.; Thedore L. Reimel, Theodore Reimel, 108 North 19th Street, Philadelphia, Pa., Solicitors for Intervening Defendants.

[fol. 149] In United States District Court, for the Eastern District of Pennsylvania, Sitting in Equity

December Term, 1929

No. 5781

Injunction Bill

The Merchants Warehouse Company

vs.

United States and Interstate Commerce Commission

December Term, 1929

No. 5789

Injunction Bill

PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT COMPANY

vs.

UNITED STATES and INTERSTATE COMMERCE COMMISSION

December Term, 1929

No. 5791

Injunction Bill

PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY

vs.

UNITED STATES and INTERSTATE COMMERCE COMMISSION

INJUNCTION BILL

Before Judges Buffington, Circuit Judge, Thompson and Dickinson, District Judges, Specially Sitting

OPINION SUR PETITION FOR ORDER OF SUPERSEDEAS—Filed Nov. 19, 1930

PER CURIAM:

The United States Commerce Commission made a "cease and desist order" against the railroads concerned with this [fol. 150] cause. The order was approved by the above Specially Constituted Court, the Circuit Judge, however, dissenting. The parties concerned against whom the order has been made have the right to an appeal to the Supreme Court of the United States, which appeal, with the sanction of this Court, may be made a supersedeas. The petition now under consideration is for such superseadeas order. Answers have been filed to the petition opposing the allowance of a supersedeas. The question is over its allowance. In the cases which may be termed ordinary cases in Equity supersedeas orders are usually allowed. Appeals from orders of the Interstate Commerce Commission are, however, in a class by themselves.

The opinion in the Virginia case, reported in 272 U. S., 658 has been fitly characterized by counsel as illuminating this general subject. In that case an order of supersedeas had been made by the Court below, from which order the United States and the Commission appealed by way of cross-appeal to the appeal which had been taken from the decree which affirmed the order of the Commission.

From the opinion in the cited case the following propositions may be extracted:

1. The policy of the law is to apply I. C. C. rulings without "the law delays" and not to interfere with nor interrupt their operation. This general policy has been enjoined by Congress.

2. This policy is emphasized when the Court below has approved of the orders of the Commission.

3. There is because of this a prima facie presumption against the allowance of a superesedeas, and it is not to be allowed unless the special features of the particular case [fol. 151] justify it.

4. The key to the ruling in the cited case is whether there is any peasonable basis for the expectation of a reversal by the Supreme Court.

5. A dissenting opinion will not of itself raise a doubt but it may justify it.

6. Irreparable damage alone is not a justifying cause for suspending the operation of the order of the Commission but is to have consideration.

Confidence in the correctness of a judgment reached and a reasonable doubt of the correctness of that judgment may seem to be inconsistent states of mind. They may, none the less, both exist. The judgment reached in the instant case was a majority judgment. The Judges who joined in it, of course think the majority opinion is the correct one, but the questions raised are of such a character that no one could be so sure that the majority opinion is right as to feel that there may not be a reasonable expectation of a reversal. The practices condemned by the order of the Commission have been followed for more than a gene-

ration. If, as has been found, they are condemned by the law they must, of course, cease, but there would be little, if any, value in interdicting then during the interval between the order by the Commission and the final determination of the cause by the Supreme Court. This was the thought which prompted the decree of this Court suspending the order of the Commission until this Bill was heard. There is the same reason for allowing the supersedeas as for the interdicting order before entered. Indeed, the latter is but an extension in time of the other. "Irreparable damage" is a sonorous phrase but is often without any definite meaning. The appellants will, of course, be without [fol. 152] their allowance during the pendency of the appeal, if the supersedeas is not allowed. This would be a loss and is irreparable in a sense, if the allowances cannot be recovered after a reversal; otherwise their loss would be barely more than negligible. Something more than this is called for to justify a supersedeas.

The like observation applies to the complainants against the condemned practices who might lose some business if the supersedeas is allowed and the decree of this Court affirmed. This loss is more or less speculative. There is in the sense indicated irreparable loss whether the supersedeas is allowed or refused.

The touchstone of the question is, as already indicated, whether there can be given what is called in some jurisdictions "a certificate or reasonable doubt." This certificate we are ready to give.

The appellants and their counsel entertain such a doubt of the correctness of the law as announced in the majority opinion of this Court, and the good faith of the appellants and their counsel in taking the appeal is undoubted. Indeed, the word doubt does not express the state of mind of the appellants. They feel more than hopeful of securing a reversal of the decree reached, and are fully justified in this attitude of mind, not only because of the nature of the questions raised, but also because one of the sitting Judges was in agreement with the appellants on their version of the law. As already stated, neither the fact of irreparable damage nor the fact of a dissenting opinion will either or together alone support an order of supersedeas. We base the order made upon the fact of irreparable damage fol-

[fol. 153] lowing its refusal; the fact that the conclusion was reached by a majority of this Court, with the Circuit Judge dissenting, and upon the unanimous judgment of the Court that there is not merely reasonable doubt of the true state of the law on the subject but that this doubt is amply sufficient to justify the appeal, and that neither the orders of the Commission nor the decree of this Court should go into operation and effect until the law of the subject has been finally declared.

Our conclusion may be summed up in the judgment that on a consideration of all the fact features of the case it would be disrupting to interfere with such long existing practices until their illegality has been finally determined, and that nothing would be gained of any real value in enforcing a decree which may be reversed.

We accordingly grant the order of supersedeas, and allow the exception thereto asked for by the appellees.

We add the statement that before allowing this supersedeas we receive the assurance of counsel on both sides of the controversy that a hearing upon the appeal would be speeded in every possible way, the appellants undertaking to perfect their appeal, if possible, within thirty days, and the assurance being given that an appropriate motion would be made in the Supreme Court for an early disposition of the case.

[fol. 154] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 5781

THE MERCHANTS WAREHOUSE COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Respondents

FINAL DECREE—Filed Nov. 19, 1930

These causes came on for final hearing at this term before the specially constituted court of three judges, duly

convened according to statute, and was argued by counsel and evidence, arguments and briefs of the parties having been fully heard and considered, and the Court being of the opinion, for the reasons set forth in its written decision filed herein on October 8, 1930, that the petitions should be dismissed for want of equity, and that the orders heretofore entered by the Court temporarily staying and suspending the operation of the order of the Interstate Commerce Commission should be dissolved, it is

Ordered, adjudged and decreed as follows: (1) that the temporary orders entered February 21, 1930 and April 15, 1930, staying and suspending the operation of said order of the Interstate Commerce Commission be, and they are hereby dissolved; (2) The exceptions of the plaintiff to the Court's findings of fact and conclusions of law are overruled and dismissed; (3) That the petitions be, and they are hereby dismissed for want of equity, at the cost of the petitioners.

[fol. 155] This 19th day of November, 1930.

(S) Joseph Buffington, United States Circuit Judge.
(S) J. W. Thompson, United States District Judge.
(S) O. B. Dickinson, United States District Judge.

[fol. 156] IN UNITED STATES DISTRICT COURT

No. 5781.

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed Nov. 19, 1930

Petition for Appeal

Considering itself aggrieved by the decision of the United States District Court for the Eastern District of Pennsylvania, the Plaintiff therein, Merchants Warehouse Company, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Assignments of Error

And the said Merchants Warehouse Company assigns the following errors in the record and proceedings in the said case:

1. The District Court erred in dismissing the bill.

2. The District Court erred in refusing to enjoin the order of the Interstate Commerce Commission entered in [fol. 157] the case of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company vs. Pennsylvania Railroad Company.

3. The District Court erred in its Finding of Fact Number 1 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

1. The Court erred in Finding of Fact Number 1. The said Finding is as follows:

* * * * * * *

4. The District Court erred in its Finding of Fact Number 4 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 4. The said Finding of Fact is as follows:

* * * * * * *

[fol. 158] 5. The District Court erred in its Finding of Fact Number 8 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 8. The said Finding of Fact is as follows:

* * * * * * *

6. The District Court erred in its Finding of Fact Number 9 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 9. The said Finding of Fact is as follows:

* * * * * * *

[fol. 159] 7. The District Court erred in its Finding of Fact Number 10 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 10. The said Finding of Fact is as follows:

* * * * * * *

8. The District Court erred in its Finding of Fact Number 13 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 13. The said Finding of Fact is as follows:

* * * * * * *

9. The District Court erred in its Finding of Fact Number 14, and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 14. The said Finding of Fact is as follows:

* * * * * * *

10. The District Court erred in its Finding of Fact Num-
[fol. 160] ber 15 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 15. The said Finding of Fact is as follows:

* * * * * * *

11. The District Court erred in its Finding of Fact Number 16, and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 16. The said Finding of Fact is as follows:

* * * * * * *

12. The District Court erred in its Finding of Fact Number 17, and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 17. The said Finding of Fact is as follows:

* * * * * * *

13. The District Court erred in its Finding of Fact Num-
[fol. 161] ber 18 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 18. The said Finding of Fact is as follows:

* * * * * * *

14. The District Court erred in its Finding of Fact Number 19 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 19. The said Finding of Fact is as follows:

* * * * * * *

15. The District Court erred in its Finding of Fact Number 20 and in overruling the plaintiff's exception to that finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 20. The said Finding of Fact is as follows:

* * * * * * *

16. The District Court erred in its Finding of Fact Number 21 and in overruling the plaintiff's exception to that Finding. The Finding of Fact and the Exception are
[fol. 162] as follows:

The Court erred in Finding of Fact Number 21. The said Finding of Fact is as follows:

* * * * * * *

17. The District Court erred in its Finding of Fact Number 26 and in overruling the plaintiff's exception to that Finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 26. The said Finding of Fact is as follows:

* * * * * * *

18. The District Court erred in its Finding of Fact Number 27 and in overruling the plaintiff's exception to that Finding. The Finding of Fact and the Exception are as follows:

The Court erred in Finding of Fact Number 27. The said Finding of Fact is as follows:

* * * * * * *

[fol. 163] 19. The District Court erred in its Conclusion of Law Number 1 and in overruling the plaintiff's exception to that Conclusion. The Conclusion of Law and the Exception are as follows:

The Court erred in Conclusion of Law Number 1. The said Conclusion of Law is as follows:

* * * * * * *

20. The District Court erred in its Conclusion of Law Number 2, and in overruling the plaintiff's exception to the Conclusion. The Conclusion of Law and the Exception are as follows:

The Court erred in Conclusion of Law Number 2. The said Conclusion of Law is as follows:

* * * * * * *

21. The District Court erred in its Conclusion of Law Number 3 and in overruling the plaintiff's exception to the Conclusion. The Conclusion of Law and the Exception are as follows:

The Court erred in Conclusion of Law Number 3. The said Conclusion of Law is as follows:

* * * * * * *

22. The District Court erred in its Conclusion of Law Number 4 and in overruling the plaintiff's exception to the Conclusion. The Conclusion of Law and the Exception are as follows:

[fols. 164 & 165] The Court erred in Conclusion of Law Number 4. The said Conclusion of Law is as follows:

* * * * * * *

23. The District Court erred in its Conclusion of Law Number 5 and in overruling the plaintiff's exception to that Conclusion. The Conclusion of Law and the Exception are as follows:

The Court erred in Conclusion of Law Number 5. The said Conclusion of Law is as follows:

* * * * * * *

Prayer for Reversal

For which errors the Plaintiff, Merchants Warehouse Company, prays that the said decree of the United States District Court for the Eastern District of Pennsylvania, dated November 19th, 1930, in the above entitled cause, be reversed and a decree rendered in favor of the said Plaintiff enjoining the said order of the Interstate Commerce Commission as therein prayed and for costs.

Allen S. Olmsted, 2nd, M. Hampton Todd, Attorneys for Petitioner.

[fols. 166-168] Citation, in usual form, showing service on Elmer B. Collins et al., filed November 19, 1930, omitted in printing.

[fol. 169] IN UNITED STATES DISTRICT COURT

No. 5781

[Title omitted]

PETITION OF THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, THE PHILADELPHIA BOURSE, the GROCERS & IMPORTERS EXCHANGE, AND ASSOCIATION OF MANUFACTURERS' REPRESENTATIVES, INC., INTERVENORS IN BEHALF OF THE PLAINTIFF, FOR APPEAL, ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Dec. 24, 1930

Petition for Appeal

Considering themselves aggrieved by the decision of the United States District Court for the Eastern District of Pennsylvania, the Intervenors therein in behalf of the Plaintiffs, the Commercial Exchange of Philadelphia, Philadelphia Board of Trade, The Philadelphia Bourse, The Grocers & Importers Exchange and Association of Manufacturers' Representatives, Inc. hereby pray that an appeal be allowed to the Supreme Court of the United States herein.

[fols. 170 & 171] Assignment of Errors

The said Intervenors in behalf of the Plaintiff, The Commercial Exchange of Philadelphia, Philadelphia Board of Trade, The Philadelphia Bourse, The Grocers & Importers Exchange and Association of Manufacturers' Representatives, Inc., adopt as their own the Assignment of Errors heretofore filed by the Plaintiff.

Prayer for Reversal

For the said errors, the Intervenors in behalf of the Plaintiff, The Commercial Exchange of Philadelphia, Philadelphia Board of Trade, The Philadelphia Bourse, The Grocers & Importers Exchange and Association of Manufacturers' Representatives, Inc. pray that the said decree of the United States District Court for the Eastern

District of Pennsylvania, dated November 19th, 1930, in the above entitled cause, be reversed and a decree rendered in favor of the said Plaintiffs, enjoining the said order of the Interstate Commerce Commission as therein prayed.

(S.) Allen S. Olmsted, 2nd, Attorney for Petitioner.

We hereby assent to the joining of above named as parties appellant without the filing of an additional bond.

(S.) Elmer B. Collins, for the Attorney General of the United States. John J. Hickey, for Intervenors in behalf of the Plaintiffs. J. Stanley Payne, for Interstate Commerce Commission.

[fols. 172-174] Citation, in usual form, showing service on Elmer B. Collins et al., filed December 26, 1930, omitted in printing.

[fol. 175] In United States District Court

No. 5781

[Title omitted]

Order Allowing Appeal—Filed Dec. 24, 1930

The Plaintiff in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from a decree made and entered by this Court on the 19th day of November, 1930, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided, and the said appeal having been allowed upon the filing of a bond in the sum of $2000 as security for costs, and the said bond having been filed by the said Plaintiff and The Commercial Exchange of Philadelphia, Philadelphia Board of Trade, The Philadelphia Bourse, The Grocers & Importers Exchange and Association of Manufacturers' Representatives, Inc., Intervenors in behalf of the Plaintiff, having likewise prayed for the

allowance of an appeal in this cause to the Supreme Court of the United States from a decree made and entered by [fols. 176 & 177] this Court on the 19th day of November, 1930, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is Now Here Ordered that an appeal to the Supreme Court of the United States from the United States District Court for the Eastern District of Pennsylvania, in this cause, be and the same is hereby allowed to the said The Commercial Exchange of Philadelphia, Philadelphia Board of Trade, The Philadelphia Bourse, The Grocers & Importers Exchange and Association of Manufacturers' Representatives, Inc. Intervenors in behalf of the Plaintiff, and the said Intervenors in behalf of the Plaintiff are hereby joined as parties appellant to the said appeal heretofore allowed to the Plaintiff.

Joseph Buffington, C. J.; J. W. Thompson, D. J.; O. B. Dickinson, D. J.

December 23, 1930.

[fols. 178 & 179] Bond on appeal for $2,000, approved and filed November 19, 1930, omitted in printing.

[fol. 180] IN UNITED STATES DISTRICT COURT

No. 5781

[Title omitted]

COPY OF NOTICE TO ATTORNEY GENERAL OF PENNA.—Filed Jan. 6, 1931

To the Attorney General of Pennsylvania:

Please take notice that The Merchants Warehouse Company, The Commercial Exchange of Philadelphia, The Philadelphia Board of Trade, The Philadelphia Bourse, Grocers' and Importers' Exchange of Philadelphia and

Association of Manufacturers' Representatives, Incorporated, have taken an appeal to the Supreme Court of the United States from the decree of the District Court for the Eastern District of Pennsylvania in the above entitled cause, dismissing the prayer of the Petitioner. Said prayer was to enjoin the order of the Interstate Commerce Commission in a certain proceeding entitled James Gallagher, et al. v. Pennsylvania Railroad Company, I. C. C. Docket No. 20968.

Very truly yours, (S.) Allen S. Olmsted, 2nd, Attorney for Appellants.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Allen S. Olmsted, 2nd, being duly sworn, deposes and says that he served the notice, of which the above is a copy, upon the Attorney General of the State of Pennsylvania, by sending the same by United States mail addressed to the Attorney General of Pennsylvania, Harrisburg, Pa.

[fol. 181] (S.) Allen S. Olmsted, 2nd.

Sworn and subscribed before me this 5th day of January, 1931. (S.) Marguerite Holmes, Notary Public. (Seal.)

[fol. 182] IN UNITED STATES DISTRICT COURT

In Equity. No. 5781

[Title omitted]

ORDER ALLOWING APPEAL—Filed Nov. 19, 1930

The plaintiff in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered by this Court on the 19th day of November, 1930, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is Now Here Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the United States District Court for the Eastern District of Pennsylvania in this cause, as provided by law, and it is further ordered that the clerk of the Court shall prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to [fols. 183 & 184] the Supreme Court of the United States so that he shall have the same in said Court within thirty days of this date.

It is Further Ordered that the said Order of the Interstate Commerce Commission in the matter of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company vs. Pennsylvania Railroad Company, be and it hereby is stayed and suspended pending the determination of this appeal by the Supreme Court of the United States, to which ruling an exception is allowed to the Respondents and each of them.

And It is Further Ordered that security for costs on appeal be fixed in the sum of $2,000.00.

J. W. Thompson, D. J.; Joseph Buffington, O. B. Dickinson.

[fol. 185] IN UNITED STATES DISTRICT COURT

In Equity. No. 5781

[Title omitted]

PETITION FOR CROSS-APPEAL BY UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WALTER A. BAILEY, TERMINAL WAREHOUSE COMPANY, REX & COMPANY, INCORPORATED, JAMES GALLAGHER, NORTHEASTERN WAREHOUSE COMPANY, AND INDUSTRIAL COLD STORAGE & WAREHOUSE COMPANY—Filed Jan. 7, 1931

United States of America and Interstate Commerce Commission, respondents, and Walter A. Bailey, Terminal Warehouse Company, Rex & Company, Incorporated, James Gallagher, Northeastern Warehouse Company and Industrial Cold Storage & Warehouse Company, intervening respondents, feeling themselves aggrieved by the following,

the third, paragraph of the order of the District Court allowing appeal, made and entered November 19, 1930, viz:

"It is Further Ordered that the said Order of the Interstate Commerce Commission in the matter of James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, and Terminal Warehouse Company vs. Pennsylvania Railroad Company, be and it hereby is stayed and suspended pending the determination of this appeal by the Supreme Court of the United States, to which ruling an exception is allowed to the respondents and each of them."

[fol. 185a] pray a cross-appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the foregoing paragraph erroneous are set forth in the assignment of error on file to which reference is hereby made.

They pray that a transcript of the record, pleadings, and papers on which the foregoing quoted order was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

John Lord O'Brian, Assistant to Attorney General, for United States of America. Daniel W. Knowlton, J. Stanley Payne, Solicitors for Interstate Commerce Commission. John J. Hickey, Solicitor for Walter A. Bailey, Terminal Warehouse Company, Rex & Company, Inc., James Gallagher, Northeastern Warehouse Company, and Industrial Cold Storage & Warehouse Company.

[fol. 186] IN UNITED STATES DISTRICT COURT

In Equity. No. 5781

[Title omitted]

ASSIGNMENT OF ERROR ON CROSS-APPEAL—Filed Jan. 7, 1931

United States of America and Interstate Commerce Commission, respondents, and Walter A. Bailey, Terminal Warehouse Company, Rex & Company, Incorporated, James Gallagher, Northeastern Warehouse Company and

Industrial Cold Storage & Warehouse Company, intervening respondents, now come, by their respective counsel, and, in connection with their petition for cross-appeal, file the following assignment of error on which they will rely in their cross-appeal to the Supreme Court of the United States from the third paragraph of the order of the District Court allowing appeal, entered November 19, 1930:

The District Court erred in staying and suspending the Commission's order in the matter of James Gallagher et al. v. Pennsylvania Railroad Company, pending determination of the appeal by the Supreme Court of the United States. [fol. 186a], Wherefore respondents and intervening respondents, and each of them, pray that said third paragraph of the order allowing appeal, entered November 19, 1930, be reversed, annulled, and set aside, with directions that the stay and suspension pending appeal shall be forthwith dissolved, and for such other and further orders as may be appropriate.

John Lord O'Brian, Assistant to the Attorney General, for United States of America. Daniel W. Knowlton, J. Stanley Payne, Solicitors for Interstate Commerce Commission. John J. Hickey, Solicitor for Walter A. Bailey, Terminal Warehouse Company, Rex & Company, Inc., James Gallagher, Northeastern Warehouse Company, and Industrial Cold Storage & Warehouse Company.

[fol. 187] IN UNITED STATES DISTRICT COURT

In Equity. No. 5781

[Title omitted]

ORDER ALLOWING CROSS-APPEAL.—Filed Jan. 7, 1931

In the above-entitled cause, United States of America and Interstate Commerce Commission, respondents, and Walter A. Bailey, Terminal Warehouse Company, Rex & Company, Incorporated, James Gallagher, Northeastern Warehouse Company and Industrial Cold Storage & Warehouse Company, intervening respondents, having made and

filed their petition praying a cross-appeal to the Supreme Court of the United States from the third paragraph of the order of the District Court allowing appeal, made and entered November 19, 1930, and having also made and filed an assignment of error, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the cross-appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the [fol. 188] Clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said stay order was made and entered to the Supreme Court of the United States.

J. W. Thompson, J.

Jan. 7, 1931.

[fols. 189 & 190] Citation, in usual form, showing service on H. Edgar Barnes and Allen S. Olmsted, 2d, filed January 7, 1931, omitted in printing.

[fol. 191] In United States District Court

In Equity. No. 5781

[Title omitted]

Copy of Notice of Cross-appeal to the Attorney General of the State of Pennsylvania—Filed Jan. 7, 1931

To the Honorable, the Attorney General of the State of Pennsylvania, Harrisburg, Pa.:

You are hereby notified that the United States of America and the Interstate Commerce Commission, respondents, and Walter A. Bailey, Terminal Warehouse Company, Rex & Company, Incorporated, James Gallagher, Northeastern Warehouse Company and Industrial Cold Storage & Warehouse Company, intervening respondents, in the above-entitled case, have taken a cross-appeal to the Supreme Court of the United States from the order of the

District Court made and entered November 19, 1930, which stayed and suspended the order of the Interstate Commerce Commission in the proceeding entitled James Gallagher et al. v. Pennsylvania Railroad Company, Docket No. 20968, made and entered December 28, 1929, pending determination of the appeal by the Supreme Court of the United States.

This notice is given to you pursuant to the provisions of [fol. 192] the Urgent Deficiencies Act of October 22, 1913, (ch. 32, 38 Stat. 208, 220, 221, U. S. C. Title 28, Sec. 47).

John Lord O'Brian, Assistant to the Attorney General, for the United States of America. Daniel W. Knowlton, J. Stanley Payne, Solicitors for Interstate Commerce Commission. John J. Hickey, Solicitor for Walter A. Bailey, Terminal Warehouse Company, Rex & Company, Inc., James Gallagher, Northeastern Warehouse Company, and Industrial Cold Storage & Warehouse Company.

State of Pennsylvania,
County of Philadelphia, ss:

J. Stanley Payne, being duly sworn according to law, deposes and says that he is Solicitor for the Interstate Commerce Commission and that on behalf of United States of America, the Interstate Commerce Commission, Walter A. Bailey, Terminal Warehouse Company, Rex & Company, Inc., James Gallagher, Northeastern Warehouse Company and Industrial Cold Storage & Warehouse Company, he served Notice of Cross Appeal, of which the above is a copy, upon the Attorney General of the State of Pennsylvania, by sending the same by United States Mail addressed to the Attorney General of Pennsylvania, Harrisburg, Pennsylvania, on January 7, 1931.

J. Stanley Payne (S.) J. Stanley Payne.

Sworn to and subscribed before me this 7 day of January, 1931. Clifford K. Cassel, Notary Public. Notary Public. My Commission Expires Jan. 16th, 1931.

[fol. 193] IN UNITED STATES DISTRICT COURT

December Term, 1929

No. 5781

December Term, 1929

No. 5789

December Term, 1929

No. 5791

[Titles omitted]

ORDER EXTENDING TIME FOR DOCKETING CASES—Filed Dec. 17, 1930

For good cause appearing and upon consent of counsel for all parties the time for docketing the above case and filing the record thereof with the Clerk of the U. S. Supreme Court is hereby extended to and including December 31, 1930.

Joseph Buffington, Circuit Judge. J. W. Thompson, District Judge. O. B. Dickinson, District Judge.

[fol. 194] Consenting to:

M. Hampton Todd, Attorney for Merchants Warehouse Company, Appellant. H. Edgar Barnes, Attorney for the Pennsylvania Warehousing & Safe Deposit Company, Appellant. John P. Connelly, Attorney for the Philadelphia Warehousing & Cold Storage Company, Appellant. Allen S. Olmsted, 2nd, Attorney for Commercial Exchange of Philadelphia et al., Appellants. Elmer B. Collins Special Assistant to the Attorney General, for the United States, Appellee. J. Stanley Payne, Attorney for Interstate Commerce Commission, Appellee. John J. Hickey, Attorney for Intervening Defendants, Appellees.

[fol. 195] IN UNITED STATES DISTRICT COURT

In Equity. No. 5781

In Equity. No. 5789

In Equity. No. 5791

[Titles omitted]

ORDER EXTENDING TIME FOR DOCKETING CASES—Filed Dec. 30, 1930

For good cause and upon the stipulation of counsel for [fol. 196] all parties, the time for docketing the above cases and filing the records thereof with the Clerk of the Supreme Court of the United States is hereby enlarged to and including January 10, 1931.

(Signed) Joseph Buffington, Circuit Judge.
(Signed) J. W. Thompson, District Judge.
(Signed) O. W. Dickinson, District Judge. J. Stanley Payne, Counsel for Interstate Commerce Commission. Allen S. Olmsted, 2nd, Counsel for Merchants Warehouse Company.

[fol. 197] [File endorsement omitted]

BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 20968

JAMES GALLAGHER, NORTHEASTERN WAREHOUSE COMPANY, Walter A. Bailey, Terminal Warehouse Company, Complainants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant

FORMAL COMPLAINT—Filed April 26, 1928

The complaint of the above named complainants respectfully shows:

I

(a) That at all times mentioned herein James Gallagher, complainant herein, trading and doing business under the name and style "Gallagher's Warehouses," had a general office at No. 50 South Third Street in the city of Philadelphia in the state of Pennsylvania and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(b) That at said times the Northeastern Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Sedgely and Erie Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and [fol. 198] occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

(c) That at said times Walter A. Bailey, complainant herein, trading and doing business under the name and style "Bailey Warehouses," had a general office at Delaware Avenue and South Streets in said Philadelphia and at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(d) That at said times the Terminal Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Delaware and Fairmount Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

II

That at said times the Pennsylvania Railroad Company, the defendant, was a corporation organized under the laws of Pennsylvania and was a common carrier engaged in the

transportation of property wholly by railroad, for hire, between said Philadelphia, a point on its railway route, and various points outside the state of Pennsylvania, and, as such common carrier, was subject to the provisions of the Interstate Commerce Act.

III

(a) That at said times the Merchants Warehouse Company, Inc. was a corporation organized under the laws of said Pennsylvania; had a general office at No. 10 Chestnut [fol. 199] in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia and competed with each of the complainants in carrying on its said warehouse business.

(b) That at said times The Quaker City Cold Storage Company, Inc. was a corporation organized and existing under the laws of Pennsylvania; had a general office at No. 211 Callowhill Street in said Philadelphia; occupied and used warehouses and warehouse facilities in said Philadelphia; conducted a warehouse business at said Philadelphia and in the conduct of that business competed with complainants.

(c) That, for convenience, said Merchants Warehouse Company and said Quaker City Cold Storage Company, Inc. collectively are referred to herein as the subsidized warehouse companies.

IV

(a) That during the period of time from April 27, 1926 to the date of the filing of this complaint, herein called the period of two years, each of the complainants and said subsidized warehouse companies in the conduct of his or its warehouse business, shipped numerous carloads, and smaller lots of property outbound from their warehouses in said Philadelphia to various points outside the state of Pennsylvania and tendered said property to defendant for transportation.

(b) That during said period of two years each of the complainants and said subsidized warehouse companies, in the conduct of his or its warehouse business, caused numerous carloads, and smaller lots, of property to be shipped

from various points outside the state of Pennsylvania to said Philadelphia and to be delivered to them by the de-
[fol. 200] fendant at their warehouses in said Philadelphia.

(c) That during said period the defendant and its connecting lines transported said property, for hire, in interstate commerce between said warehouses in Philadelphia and said points outside the state of Pennsylvania.

(d) That said property which defendant transported for complainants was similar to the property which defendant transported for said subsidized warehouse companies and the defendant performed said transportation service contemporaneously and under substantially similar circumstances and conditions.

V

(a) That at various times during said period of two years the defendant gave allowances of 50 cents per ton and of other amounts per ton to said subsidized warehouse companies out of its published freight rates for said transportation of said property to and from warehouses of said subsidized warehouse companies.

(b) That certain of said allowances are referred to in defendant's published tariff bearing the number G. O. ICC No. 14400.

VI

(a) That at the times the defendant transported the property, as alleged in Paragraph IV above, the defendant charged, collected and received its filed and published rates applicable to said transportation service and, later, at various times, the defendant, by the means of the allowances, special rates, rebates, drawbacks and concessions, as alleged in Paragraph V above, which were devices used for the purpose of facilitating violations of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins
[fol. 201] Act, refunded and remitted to said subsidized warehouse companies part of the defendant's said filed and published rates which were lawfully applicable to said transportation of property performed by defendant for said subsidized warehouse companies.

(b) That through and by the means of the said devices the defendant transported said property for said subsi-

dized warehouse companies at net rates which were materially less than its filed and published rates which it charged and collected for similar transportation of property for complainants.

VII

That by reason of the facts stated in the foregoing paragraphs complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are unjustly discriminatory in violation of Section 2 of said Act, and, unduly preferential of said subsidized warehouse companies, competitors of complainants, and unduly prejudicial to complainants in violation of Section 3 of said Act. That each of the complainants has been injured thereby to his or its damage in a large sum of money.

VIII

Wherefore complainants pray that defendant may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant to cease and desist from the aforesaid violations of said Act and also pay to each of complainants by way of reparation for said damage, and, for additional damage arising from similar unlawful conduct of defendant during the prosecution of this case, such sum of money as, in view of the evidence to be adduced herein, the Commission shall [fol. 202] determine that each of the complainants is entitled to as an award of damages, with interest, under the provisions of said Act for violation thereof and that such other and further order or orders be made as the Commission may consider proper in the premises.

James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, Terminal Warehouse Company, Complainants, by John J. Hickey, 800 Southern Building, Washington, D. C., Attorney for Complainants.

Dated at Washington, D. C., April 27, 1928.

[fol. 203] [File endorsement omitted]

BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 20968, Sub. No. 1

WALTER A. BAILEY, TERMINAL WAREHOUSE COMPANY, Complainants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant

FORMAL COMPLAINT—Filed April 26, 1928

The complaint of the above named complainants respectfully shows:

I

(a) That at all times mentioned herein Walter A. Bailey, complainant herein, trading and doing business under the name and style "Bailey Warehouses," had a general office at Delaware Avenue and South Streets in the city of Philadelphia in the state of Pennsylvania and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

[fol. 204] (b) That at all said times the Terminal Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Delaware and Fairmount Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

II

That at said times The Baltimore and Ohio Railroad Company, the defendant, was a duly organized corporation

and was a common carrier engaged in the transportation of property wholly by railroad, for hire, between said Philadelphia, a point on its railway route, and various points outside the state of Pennsylvania and, as such common carrier, was subject to the provisions of the Interstate Commerce Act.

III

That at said times The Pennsylvania Warehousing and Safe Deposit Company, herein called the subsidized warehouse, was a duly organized corporation; had a general office at No. 113 South Third Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia and competed with complainants in carrying on its said warehouse business.

IV

(a) That during the period of time from April 27, 1926 to the date of the filing of this complaint, herein called the period of two years, the complainants and said subsidized [fol. 205] warehouse shipped numerous carloads and smaller lots of property, outbound from their warehouses in said Philadelphia to various points outside the state of Pennsylvania and tendered said property to defendant for transportation.

(b) That during said period of two years the complainants and said subsidized warehouse caused numerous carloads and smaller lots of property to be shipped from various points outside the state of Pennsylvania to said Philadelphia and to be delivered to them by the defendant at their warehouses in said Philadelphia.

(c) That during said period the defendant and its connecting lines transported said property, for hire, in interstate commerce between said warehouses in Philadelphia and said points outside the state of Pennsylvania.

(d) That said property which defendant transported for complainants was similar to the property which defendant transported for said subsidized warehouse and further, the defendant performed said transportation service contemporaneously and under substantially similar circumstances and conditions.

V

That at various times during said period of two years the defendant gave allowances of Fifty Cents per ton, Thirty-five Cents per ton and of other amounts per ton to said subsidized warehouse out of its published freight rates for said transportation of said property to and from warehouses of said subsidized warehouse.

VI

(a) That at the times the defendant transported the property, as alleged in Paragraph V above, the defendant charged, collected and received its filed and published rates [fol. 206] applicable to said transportation service and, later, at various times, the defendant, by the means of the allowances, special rates, rebates, and drawbacks, as alleged in Paragraph V above, which were devices used for the purpose of facilitating violations of Sections 2 and 3 of the Interstate Commerce Act, refunded and remitted to said subsidized warehouse part of the defendant's said filed and published rates which were lawfully applicable to, and for, said transportation of property performed by defendant for said subsidized warehouse.

(b) That through and by the means of the said devices the defendant transported said property for said subsidized warehouse at net rates which were materially less than its filed and published rates which it charged and collected for similar transportation of property for complainants.

VII

That by reason of the facts stated in the foregoing paragraphs complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are unjustly discriminatory in violation of Section 2 of said Act, and, unduly preferential of said subsidized warehouse, competitor of complainants, and unduly prejudicial to complainants in violation of Section 3 of said Act. That each of the complainants has been injured thereby to his or its damage in a large sum of money.

VIII

Wherefore complainants pray that defendant may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant to cease and desist from the aforesaid violations [fol. 207] of said Act and also pay to each of complainants by way of reparation for said damage, and, for additional damage arising from similar unlawful conduct of defendant during the prosecution of this case, such sum of money as, in view of the evidence to be adduced herein, the Commission shall determine that each of the complainants is entitled to as an award of damages, with interest, under the provisions of said Act for violation thereof and that such other and further order or orders be made as the Commission may consider proper in the premises.

Walter A. Bailey, Terminal Warehouse Company, Complainants, by John J. Hickey, 800 Southern Building, Washington, D. C., Attorney for Complainants.

Dated at Washington, D. C., April 27, 1928.

[fol. 208] [File endorsement omitted]

BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 20968, Sub No. 2

REX & COMPANY, INC., JAMES GALLAGHER, NORTHEASTERN Warehouse Company, Walter A. Bailey, Terminal Warehouse Company, Industrial Cold Storage and Warehouse Company, Complainants,

vs.

READING COMPANY, Defendant

FORMAL COMPLAINT—Filed April 26, 1928

The complaint of the above named complainants respectfully shows:

I.

(a) That at all times mentioned herein Rex & Company, Inc. complainant herein, was a corporation organized and existing under the laws of the state of Pennsylvania; had a general office at Philip Street near York Street in the City of Philadelphia in said state and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

[fol. 209] (b) That at said times James Gallagher, complainant herein, trading and doing business under the name and style "Gallagher's Warehouses," had a general office at No. 50 South Third Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(c) That at said times the Northeastern Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Sedgely and Erie Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

(d) That at said times Walter A. Bailey, complainant herein, trading and doing business under the name and style "Bailey Warehouses," had a general office at Delaware Avenue and South Streets in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on his said warehouse business.

(e) That at said times the Industrial Cold Storage and Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at No. 1905 North American Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used ware-

houses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

[fol. 210] (f) That at said times the Terminal Warehouse Company, complainant herein, was a corporation organized and existing under the laws of said Pennsylvania; had a general office at Delaware and Fairmount Avenues in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia in carrying on its said warehouse business.

II

That at said times Reading Company, the defendant, was a corporation organized under the laws of said Pennsylvania and was a common carrier engaged in the transportation of property wholly by railroad, for hire, between said Philadelphia, a point on its railway route, and various points outside the state of Pennsylvania and, as such common carrier, was subject to the provisions of the Interstate Commerce Act.

III

(a) That at said times The Pennsylvania Warehousing and Safe Deposit Company, was a corporation organized under the laws of said Pennsylvania; had a general office at No. 113 South Third Street in said Philadelphia and, at said Philadelphia, conducted a warehouse business and occupied and used warehouses and warehouse facilities at several locations in said Philadelphia and competed with complainants in carrying on its said warehouse business.

(b) That at said times the Philadelphia Warehousing and Cold Storage Company, a corporation of the state of Pennsylvania, had a general office at Delaware Avenue and [fol. 211] North Street in said Philadelphia; occupied and used warehouses and warehouse facilities located in said city; conducted a warehouse business in said Philadelphia and, in the conduct of that business, competed with the complainants.

(c) That, for convenience, said Pennsylvania Warehousing and Safe Deposit Company and said Philadelphia

Warehousing and Cold Storage Company collectively are called the subsidized warehouse companies herein.

IV

(a) That during the period of time from April 27, 1926 to the date of the filing of this complaint, herein called the period of two years, the complainants and said subsidized warehouse companies shipped numerous carloads and smaller lots of property outbound from their warehouses in said Philadelphia to various points outside the state of Pennsylvania and tendered said property to defendant for transportation.

(b) That during said period of two years the complainants and said subsidized warehouse companies caused numerous carloads and smaller lots of property to be shipped from various points outside the state of Pennsylvania to said Philadelphia and to be delivered to them by the defendant at their warehouses in said Philadelphia.

(c) That during said period the defendant and its connecting lines transported said property, for hire, in interstate commerce between said warehouses in Philadelphia and said points outside the state of Pennsylvania.

(d) That said property which defendant transported for complainants was similar to the property which defendant [fol. 212] transported for said subsidized warehouse companies and the defendant performed said transportation service contemporaneously and under substantially similar circumstances and conditions.

V

(a) That at various times during said period of two years the defendant gave allowances of Fifty Cents per ton, Thirty-five Cents per ton and of other amounts per ton to said subsidized warehouse companies out of its published freight rates for said transportation of said property to and from warehouses of said subsidized warehouse companies.

VI

(a) That at the times the defendant transported the property, as alleged in Paragraph IV above, the defendant

charged, collected and received its filed and published rates applicable to said transportation service and, later, at various times, the defendant, by the means of the allowances, special rates, rebates, and drawbacks, as alleged in Paragraph V above, which were devices used for the purpose of facilitating violations of Sections 2 and 3 of the Interstate Commerce Act, refunded and remitted to said subsidized warehouse companies part of the defendant's said filed and published rates which were lawfully applicable to, and for, said transportation of property performed by defendant for said subsidized warehouse companies.

(b). That through and by the means of the said devices the defendant transported said property for said subsidized warehouse companies at net rates which were materially less than its filed and published rates which it charged and collected for similar transportation of property for complainants.

[fol. 213] VII

That by reason of the facts stated in the foregoing paragraphs complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are unjustly discriminatory in violation of Section 2 of said Act, and, unduly preferential of said subsidized warehouse companies, competitors of complainants, and unduly prejudicial to complainants, in violation of Section 3 of said Act. That each of the complainants has been injured thereby to his or its damage in a large sum of money.

VIII

Wherefore complainants pray that defendant may be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant to cease and desist from the aforesaid violations of said Act and also pay to each of complainants by way of reparation for said damage, and, for additionl damage arising from similar unlawful conduct of defendant during the prosecution of this case, such sum of money as, in view of the evidence to be adduced herein, the Commission shall determine that each of the complainants is entitled to as

an award of damages, with interest, under the provisions of said Act for violation thereof and that such other and further order or orders be made as the Commission may consider proper in the premises.

[fol. 214] Rex & Company, Inc., James Gallagher, Northeastern Warehouse Company, Walter A. Bailey, Industrial Cold Storage and Warehouse Company, Terminal Warehouse Company, Complainants, by John J. Hickey, 800 Southern Building, Washington, D. C., Attorney for Complainants.

Dated at Washington, D. C., April 27, 1928.

[fol. 215] Filed Jun. 1, 1928, Interstate Commerce Commission

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968, Sub No. 1

WALTER A. BAILEY, TERMINAL WAREHOUSE COMPANY, Complainants,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant

ANSWER OF THE BALTIMORE AND OHIO RAILROAD COMPANY

I. Answering the allegations contained in paragraph I of the complaint, this defendant states that it is not advised with respect thereto.

II. Answering the allegations contained in paragraph II of the complaint, this defendant admits that it is a common carrier, and that, as such, it is subject to the provisions of the Interstate Commerce Act, and the acts amendatory thereof and supplementary thereto.

III. Answering the allegations contained in paragraphs III and IV of the complaint, this defendant states that it is not fully advised with respect thereto, but it specifically denies the implication that The Pennsylvania Warehousing and Safe Deposit Company is a subsidized warehouse.

IV. This defendant denies each and every allegation contained in paragraph V of the complaint.

V. Answering the allegations contained in paragraph VI of the complaint, this defendant admits that on any property which it transported, it charged, collected and received its filed and published rates lawfully on file with the Interstate Commerce Commission, but it denies each and every other allegation contained in said paragraph.

VI. This defendant denies each and every allegation contained in paragraph VII of the complaint.

Wherefore, having answered fully, this defendant asks that the complaint herein be dismissed.

The Baltimore and Ohio Railroad Company, by Archibald Fries, Vice-President. Charles R. Webbers, Attorney for the Baltimore and Ohio Railroad Company.

[fol. 216] Filed Jun. 1, 1928, Interstate Commerce Commission

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968

JAMES GALLAGHER et al.

vs.

THE PENNSYLVANIA RAILROAD COMPANY

DEFENDANT'S ANSWER

The above named defendant, for answer to the complaint filed in this proceeding, respectfully states:

1. This defendant is without sufficient information to enable it to admit or deny the allegations of paragraph 1 of the complaint, and accordingly prays that, so far as the same be deemed material, the complainant be required to make due proof thereof.

2. This defendant admits that it is a common carrier, engaged in part in interstate commerce, and that as to

such commerce it is subject to the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, so far as the same are constitutional and enforceable.

3. This defendant is without sufficient information to enable it to admit or deny the allegations of paragraph 3 of the complaint, — accordingly prays that, so far as the same be deemed material, the complainant be required to make due proof thereof.

4. The averments of paragraph 4 of the complaint are severally denied.

5. Answering the averments of paragraph 5 of the com- [fol. 217] plaint, --ave is craved, for greater certainty, to refer to the tariff therein referred to.

6. The remaining allegations of the complaint are severally denied.

Wherefore the defendant prays that the complaint filed in this proceeding be dismissed.

The Pennsylvania Railroad Company, by V. P. Sumerfield, General Freight Agent. Henry Wolf Bikle, of Counsel.

[fol. 218] Filed Jun. 4, 1928, Interstate Commerce Commission

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 20968, Sub. No. 2

REX & COMPANY, INC., et al.

vs.

READING COMPANY

Reading Company, the defendant named in the above entitled proceeding, for its answer respectfully shows.

I. This defendant has no information with respect to the averments of paragraph I but believes same to be substantially correct.

II. This defendant admits that it is a common carrier, to some extent engaged, with its connections, in the transportation of passengers and property between points in different States of the United States, and that, as such common carrier, it is subject to the provisions of the Act to Regulate Commerce, approved February 4th, 1887, and those of the Acts amendatory thereof or supplementary thereto, insofar as such provisions are constitutional and legal.

III. Sub paragraphs (a) and (b) are believed to be correct but it is denied that said Pennsylvania Warehousing and Safe Deposit Company and said Philadelphia Warehouse and Cold Storage Company are "subsidized" by this defendant.

IV. It is denied that the said Pennsylvania Warehousing and Safe Deposit Company and said Philadelphia Warehouse and Cold Storage Company are "subsidized" by this defendant. This defendant is without sufficient information to enable it to admit or deny the remaining averments of the corresponding paragraph of the complaint and demands due proof thereof.

V. It is denied that this defendant gave any allowance out of its published freight rates to the warehouse companies referred to in the corresponding paragraph of the complaint and it is further denied that the said warehouse companies were or are "subsidized" by this defendant. On the contrary it is averred that while payments have been made by this defendant to the said warehouse companies in connection with traffic handled to and from their warehouses, said payments were not subsidies but covered service rendered and facilities provided by the warehouse companies for this defendant in connection with the handling of such traffic.

VI, VII, VIII. The averments of the corresponding paragraphs are denied and it is further denied that complainant is entitled to the order or orders prayed for or to reparation. Therefore defendant prays that the said complaint be dismissed.

Reading Company, by H. C. Stauffer, General Freight Traffic Manager. W. L. Kinter, Counsel.

Philadelphia, Pa., June 2, 1928.

[fols. 219 & 220] BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 20968

[Title omitted]

PETITION OF THE MERCHANTS' WAREHOUSE COMPANY FOR LEAVE TO INTERVENE

And now, June 12th, 1928, comes the petitioner, the Merchants' Warehouse Company and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding and prays leave to intervene in and become a party to said proceeding.

That your petitioner is a corporation duly organized under the laws of the State of Pennsylvania with its principal office at No. 10 Chestnut Street in the City of Philadelphia and State of Pennsylvania.

[fol. 221] That under the sixth paragraph of the formal complaint filed in the above matter your petitioner is charged with having accepted and received from the Pennsylvania Railroad Company, the defendant, certain allowances, special rates, rebates, drawbacks and concessions made in violation of Sections 2 and 3 of the Interstate Commerce Act and Section 1 of the Elkins Act which charges are denied.

Both in this respect and in other respects as appears on the face of the complaint, this petitioner has an interest in this proceeding.

Wherefore your petitioner prays leave to intervene as a party to these proceedings and to file an answer to the complaint with the right to have notice of and appear at any hearings or meetings in connection with this matter and to take testimony, produce and cross-examine witnesses and be heard upon brief or oral argument in the matter.

Merchants' Warehouse Company, (Sgd.) George M. Richardson, Treasurer. (Sgd.) M. Hampton Todd, Attorney for Petitioner.

[fol. 222] BEFORE INTERSTATE COMMERCE COMMISSION

No. 20968

[Title omitted]

ORDER PERMITTING INTERVENTION—June 27, 1928

Upon consideration of the record in the above-entitled proceeding and application filed on behalf of Merchants' Warehouse Company;

It is ordered, That the said Merchants' Warehouse Company be, and it is hereby, permitted to intervene and be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard in brief and on oral argument, if oral argument is heard; provided, however, that the permission to intervene herein granted shall not be construed to allow intervenor to introduce evidence which will unduly broaden the issues raised in the complaint;

It is further ordered, That a copy of the intervening petition be served upon complainants and defendant; and that a copy of this order be served upon each of the parties to this case.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 223] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968

JAMES GALLAGHER, NORTHEASTERN WAREHOUSE COMPANY, WALTER A. BAILEY, TERMINAL WAREHOUSE COMPANY, Complainants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant

PETITION FOR LEAVE TO INTERVENE

Comes now your petitioner, Millers' National Federation, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding, and

desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I

That petitioner is a voluntary association formed for the purpose of promoting the welfare of wheat millers throughout the United States; that its membership is composed of millers located in 29 states of the United States, and its members produce approximately sixty-five per cent of all the wheat flour milled in the country.

[fol. 224]

II

That your petitioner is informed and believes that the case herein presented to this Honorable Commission involves the legality and propriety of certain practices, rules and regulations of the defendants relating to the transportation of freight in car loads to and from warehouses located in the city of Philadelphia; that the members of the Millers' National Federation, petitioner herein, annually ship large quantities of flour from various points in the United States to the City of Philadelphia, and have a vital interest in the matters in controversy in this proceeding, because of the fact that said practices, rules and regulations of the carriers operate to the great detriment and disadvantage of the members of your petitioner.

Wherefore, said Millers' National Federation, petitioner herein, prays leave to intervene on behalf of the complainants in this proceeding as a party thereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in per-
[fol. 225] son or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at Chicago, Illinois, September 15, 1928.

Millers' National Federation, by Sydney Anderson, Its President, 307 N. Michigan Avenue, Chicago, Ill. Herbert J. Campbell, Attorney, 105 South LaSalle St., Chicago, Ill.

[fols. 226 & 227] BEFORE INTERSTATE COMMERCE COMMISSION

No. 20968

[Title omitted]

ORDER PERMITTING INTERVENTION—Sept. 17, 1928

Upon consideration of the record in the above-entitled proceeding and application filed on behalf of Millers' National Federation;

It is ordered, That the said Millers' National Federation be, and it is hereby, permitted to intervene and be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard in brief and on oral argument, if oral argument is heard; provided, however, that the permission to intervene herein granted shall not be construed to allow intervenor to introduce evidence which will unduly broaden the issues raised in the complaint;

It is further ordered, That a copy of the intervening petition be served upon complainants and defendant; and that a copy of this order be served upon each of the parties to this case.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 228] BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 20968, Sub 1

[Title omitted]

PETITION FOR LEAVE TO INTERVENE

Comes now your petitioner, Millers' National Federation, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding, and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I

That petitioner is a voluntary association formed for the purpose of promoting the welfare of wheat millers throughout the United States; that its membership is composed of millers located in 29 states of the United States, and its members produce approximately sixty-five per cent of all the wheat flour milled in the country.

II

That your petitioner is informed and believes that the [fol. 229] case herein presented to this honorable Commission involves the legality and propriety of certain practices, rules and regulations of the defendants relating to the transportation of freight in car loads to and from warehouses located in the City of Philadelphia; that the members of the Millers' National Federation, petitioner herein, annually ship large quantities of flour from various points in the United States to the City of Philadelphia, and have a vital interest in the matters in controversy in this proceeding, because of the fact that said practices, rules and regulations of the carriers operate to the great detriment and disadvantage of the members of your petitioner.

Wherefore said Millers' National Federation, petitioner herein, prays leave to intervene on behalf of the complainants in this proceeding as a party thereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at Chicago, Illinois, September 15, 1928.

Millers' National Federation, by Sydney Anderson, Its President, 307 N. Michigan Avenue, Chicago, Ill. Herbert J. Campbell, Attorney, 105 S. LaSalle St., Chicago, Ill.

[fol. 230] BEFORE INTERSTATE COMMERCE COMMISSION

No. 20968, Sub 1

[Title omitted]

ORDER PERMITTING INTERVENTION

Upon consideration of the record in the above-entitled proceeding and application filed on behalf of Millers' National Federation;

It is ordered, That the said Millers' National Federation be, and it is hereby, permitted to intervene and be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard in brief and on oral argument, if oral argument is heard; provided, however, that the permission to intervene herein granted shall not be construed to allow intervenor to introduce evidence which will unduly broaden the issues raised in the complaint;

It is further ordered, That a copy of the intervening petition be served upon complainants and defendant; and that a copy of this order be served upon each of the parties to this case.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 231] BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. 20968, Sub 2

[Title omitted]

PETITION FOR LEAVE TO INTERVENE

Comes now your petitioner, Millers' National Federation, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding, and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I

That petitioner is a voluntary association formed for the purpose of promoting the welfare of wheat millers throughout the United States; that its membership is composed of millers located in 29 states of the United States, and its members produce approximately sixty-five per cent of all the wheat flour milled in the country.

[fol. 232]

II

That your petitioner is informed and believes that the case herein presented to this honorable Commission involves the legality and propriety of certain practices, rules and regulations of the defendants relating to the transportation of freight in car loads to and from warehouses located in the City of Philadelphia; that the members of the Millers' National Federation, petitioner herein, annually ship large quantities of flour from various points in the United States to the City of Philadelphia, and have a vital interest in the matters in controversy in this proceeding, because of the fact that said practices, rules and regulations of the carriers operate to the great detriment and disadvantage of the members of your petitioner.

Wherefore said Millers' National Federation, petitioner herein, prays leave to intervene on behalf of the complainants in this proceeding as a party thereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at Chicago, Illinois, September 15, 1928.

Millers' National Federation, by Sydney Anderson, Its President, 307 N. Michigan Avenue, Chicago, Ill. Herbert J. Campbell, Herbert J. Campbell, Attorney, 105 S. LaSalle St., Chicago, Ill.

[fol. 233] BEFORE INTERSTATE COMMERCE COMMISSION

No. 20968, Sub. 2

[Title omitted]

ORDER PERMITTING INTERVENTION—Sept. 17, 1928

Upon consideration of the record in the above-entitled proceeding and application filed on behalf of Millers' National Federation;

It is ordered, That the said Millers' National Federation, be, and it is hereby, permitted to intervene and be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard in brief and on oral argument, if oral argument is heard; provided, however, that the permission to intervene herein granted shall not be construed to allow intervenor to introduce evidence which will unduly broaden the issues raised in the complaint;

It is further ordered, That a copy of the intervening petition be served upon complainants and defendant; and that a copy of this order be served upon each of the parties to this case.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 234] Recd. at Hearing 7-30-28. R. M. B.

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. No. 20968.

JAMES GALLAGHER et al., Complainants,

vs.

PENNSYLVANIA RAILROAD COMPANY, Defendant

I. C. C. No. 20,968 (Sub. No. 1)

WALTER A. BAILEY AND TERMINAL WAREHOUSE COMPANY, Plaintiffs,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, Defendant

I. C. C. No. 20,968 (Sub. No. 2)

REX AND COMPANY, INC., et al., Complainants,

vs.

READING COMPANY, Defendant

PETITION OF THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, THE PHILADELPHIA BOURSE, THE GROCERS & IMPORTERS EXCHANGE, AND ASSOCIATION OF MANUFACTURERS' REPRESENTATIVES, INC.

Allen S. Olmsted, 3rd, 2300 Packard Bldg., William A. Glasgow, Jr., 1018 Real Estate Trust Bldg., Philadelphia, Pa., Attorneys for Petitioners.

[fol. 235] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. No. 20968.

JAMES GALLAGHER et al., Complainants,

vs.

PENNSYLVANIA RAILROAD COMPANY, Defendant

I. C. C. No. 20,968 (Sub. No. 1)

WALTER A. BAILEY AND TERMINAL WAREHOUSE COMPANY, Plaintiffs,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, Defendant

I. C. C. No. 20,968 (Sub. No. 2)

REX AND COMPANY, INC., et al., Complainants,

vs.

READING COMPANY, Defendant

PETITION OF THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, THE PHILADELPHIA BOURSE, THE GROCERS & IMPORTERS EXCHANGE, AND ASSOCIATION OF MANUFACTURERS' REPRESENTATIVES, INC.

And now, this 24th day of July, 1928, come the petitioners above named, and represent that they, and each of them,

[fol. 236] are incorporated under the laws of the State of Pennsylvania, and that they, and each of them, were incorporated for the purpose of looking after, protecting and advancing the commercial and business interests of the members of each of said corporations and the business interests of the City of Philadelphia, and that each of said complainants, and the members thereof, who are engaged in a commercial business in the City of Philadelphia and are shippers and receivers of freight over the several railroads, defendants in the above cases, are vitally interested in the matter in controversy in the above entitled proceedings and desire to be permitted to intervene as parties defendant in the above proceedings for the protection of their, and each of their, interests, and of the business interests of their members as shippers and receivers of freight over the railroads aforesaid in the City of Philadelphia.

Petitioners, and each of them, show that the arrangement for the handling of freight through the warehouses in the City of Philadelphia, complained of in the above proceedings, has been in effect for many years, and that this arrangement between the warehouse companies and the railroads has added greatly to economy, convenience and expedition in the handling of freight, both the shipping and receiving thereof, and any interference therewith would be greatly prejudicial to the business interest of the City of Philadelphia, to each of petitioners and to members of petitioner companies; and petitioners, and each of them, deny that the arrangement between the railroad companies and the warehouse companies, complained of in the above proceeding, is in violation of the Interstate Commerce Act, or any of the Sections or Provisions thereof or the Elkins Act or any other law.

Petitioners therefore show that they, and each of them, are vitally interested in the proceedings above mentioned. [fol. 237] Wherefore, petitioners, and each of them, pray leave to intervene as a party defendant to the above proceedings, with the right to have notice of, and appear at, any hearings or meetings in connection with the above matter, and to appear by counsel and to offer such testimony as they may be advised is pertinent and proper, and to be

permitted to cross-examine witnesses, and to be heard upon brief or oral argument, as the case may be.

The Commercial Exchange of Philadelphia, by Herbert J. Horan, President. The Philadelphia Board of Trade, by Wm. M. Coates, President. The Philadelphia Bourse, by Phillip Godley, Vice President. The Grocers and Importers Exchange, by Robert L. Montgomery, President. The Association of Manufacturers Representatives, Inc., by Alfred A. O'Grady, V. P. Allen S. Olmsted, 3rd, William A. Glasgow, Jr., Attorneys for Petitioners.

Wm. A. Glasgow, Jr.

[fol. 238] Recd. at Hearing 7-30-28. R. M. B.

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968, Sub. No. 2

REX AND COMPANY, INC., et al., Complainant-,

vs.

READING COMPANY, Defendant

PETITION OF THE PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY FOR LEAVE TO INTERVENE

H. Edgar Barnes, 518 Real Estate Trust Building, Philadelphia, Pennsylvania.

[fol. 239] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968, Sub. No. 2

REX AND COMPANY, INC., et al., Complainant-,

vs.

READING COMPANY, Defendant

PETITION OF PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY FOR LEAVE TO INTERVENE.

Comes now your Petitioner, Pennsylvania Warehousing and Safe Deposit Company, and respectfully represents

that it has an interest in the matters in controversy in the above entitled proceeding and prays leave to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That your Petitioner is a Corporation organized and existing under the Laws of the State of Pennsylvania and conducts a warehousing business in the City of Phila- [fol. 240] delphia, Pennsylvania, having its principal office at No. 113 South Third Street, in the said city.

II. That the formal complaint filed in the above matter alleges that your Petitioner has accepted and received from the Reading Company, the Defendant, certain unlawful allowances, special rates, rebates, drawbacks and concessions made in violation of Sections 2 and 3 of the Interstate Commerce Act, which charges are denied.

III. Your Petitioner, therefore, respectfully submits that in respect to said allegations and in other respects as appear on the face of the Complaint, it has a direct interest in this proceeding.

Wherefore your Petitioner prays leave to intervene as a party to these proceedings with the right to file an answer to the Complaint, to have notice of and appear at any hearings or meetings in connection with this matter, to take testimony to produce and cross-examine witnesses and to be heard by Counsel upon brief or at oral argument if oral argument be granted, and to file exceptions to any report if exceptions appear to your Petitioner to be to its interest.

Pennsylvania Warehousing and Safe Deposit Company, by Ralph Earle, President, 113 South Third Street, Philadelphia, Pennsylvania. H. Edgar Barnes, Attorney for Petitioner, 518 Real Estate Trust Building, Philadelphia, Pennsylvania.

Jul. 25, 1928.

[fol. 241] Recd. at Hearing 7-30-28. R. M. B.

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 20968, Sub. No. 2

REX AND COMPANY, INC., et al.

vs.

READING COMPANY

PETITION OF PHILADELPHIA WAREHOUSING AND COLD STORAGE COMPANY FOR LEAVE TO INTERVENE

Comes now your petitioner, Philadelphia Warehousing and Cold Storage Company, and respectfully represents that it has an interest in the matters in controversy in the above entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I

That your petitioner is a corporation organized and existing under the Laws of the State of Pennsylvania, and conducts a warehousing business in the City of Philadelphia, Penna., having its main office at Delaware Avenue and Noble Street, in the said City.

[fol. 242]

II

That the complaint filed in the above proceeding alleges that your petitioner is receiving certain unlawful allowances from Reading Company in connection with traffic handled from and to its warehouses.

III

Your petitioner, therefore, respectfully submits that in view of the issues raised by the complaint, it has a direct interest therein.

Wherefore Philadelphia Warehousing and Cold Storage Company prays leave to intervene and be considered as a party hereto with the right to have notice of and appear at the taking of testimony to produce and cross-examine wit-

nesses, to be heard by counsel upon brief and at the oral argument, if oral argument is granted, and to file exceptions to the Examiner's proposed report if exceptions appear to the petitioner to be to its interest.

Dated at Philadelphia this 24 day of July, 19—.

Philadelphia Warehousing and Cold Storage Company, by J. A. Geisz, Delaware Avenue and Noble Street, Philadelphia, Pa. John P. Connelly, Attorney for Petitioner, 1526 Land Title Bldg., Philadelphia, Penna.

[fol. 242a] BEFORE INTERSTATE COMMERCE COMMISSION

No. 20968[1]

JAMES GALLAGHER ET AL.

v.

PENNSYLVANIA RAILROAD COMPANY

Submitted November 27, 1929. Decided December 28, 1929

Practice of defendants in making allowances to certain warehouse companies in connection with the loading and unloading of package freight at Philadelphia, Pa., and refusing to make such allowances to complainants, found unjustly discriminatory and unduly prejudicial. Defendants required (1) to cease and desist from publishing or making such allowances, and (2) to cancel their tariff provisions which make the warehouses of the aforesaid companies a part of their respective station facilities at Philadelphia. Reparation denied.

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[1]This report also embraces No. 20968 (Sub-No. 1), Walter A. Bailey et al. v. Baltimore & Ohio Railroad Company; and No. 20968 (Sub-No. 2), Rex & Company, Incorporated, et al. v. Reading Company.

John J. Hickey for complainants.

Herbert J. Campbell for Millers' National Federation, intervener.

Henry Wolf Biklé, Charles R. Webber, W. I. Woodcock, jr., and W. L. Kinter for defendants.

Wm. A. Glasgow, jr., and M. Hampton Todd for Merchants' Warehouse Company; Winfred M. Stilwell and H. Edgar Barnes for Pennsylvania Warehousing & Safe Deposit Company; John P. Connelly for Philadelphia Warehousing & Cold Storage Company; and Allen S. Olmsted, 2d, and Wm. A. Glasgow, jr., for Commercial Exchange of Philadelphia, Grocers' & Importers' Exchange, Philadelphia Board of Trade, Philadelphia Bourse, and Association of Manufacturers' Representatives, Incorporated, interveners.

Division 3, Commissioners Aitchison, Taylor, and Porter

REPORT OF THE COMMISSION

PORTER, Commissioner:

These cases present practically identical issues, were heard together, and will be dealt with in one report. Exceptions were filed to the report proposed by the examiner, and the issues were orally argued.

Complainants, operators of warehouses at Philadelphia, Pa., by complaints filed April 26, 1928, allege that the practice of defendants in making cash allowances to certain Philadelphia warehouse companies,[2] hereinafter referred

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[2] Complainants in No. 20968 name the Merchants' Warehouse Company and the Quaker City Cold Storage Company as being unduly preferred by the Pennsylvania Railroad Company; complainants in No. 20968 (Sub-No. 1) name the Pennsylvania Warehousing & Safe Deposit Company as being unduly preferred by the Baltimore & Ohio Railroad Company; and complainants in No. 20968 (Sub-No. 2) name the Pennsylvania Warehousing & Safe Deposit Company and the Philadelphia Warehousing & Cold Storage Company as being unduly preferred by the Reading Company.

[fol. 242-b] to as the contract warehouses, in connection with the handling of interstate shipments of package freight, in carloads and less than carloads, was and is unjustly discriminatory, unduly preferential of the contract warehouses, and unduly prejudicial to complainants, in violation of sections 2 and 3 of the interstate commerce act. We are asked to require defendants to cease and desist from the alleged violations of the act.[3] Reparation also is sought.

The Millers' National Federation intervened in behalf of complainants. Its position is substantially that of complainants and will not be separately stated here. The Merchants' Warehouse Company, Pennsylvania Warehousing & Safe Deposit Company, Philadelphia Warehousing & Cold Storage Company, Commercial Exchange of Philadelphia, Philadelphia Board of Trade, Philadelphia Bourse, Grocers' & Importers' Exchange, and Association of Manufacturers' Representatives, Incorporated, intervened in behalf of defendants. Defendants and interveners in their behalf made a formal motion at the hearing that our orders entered September 17, 1928, authorizing the Millers' National Federation to intervene, be rescinded on the ground that such intervention unduly broadens the issues. This intervener introduced no evidence. The motion is denied.

In all the larger cities, including Philadelphia, public warehouses are customarily used for the receipt, storage, and distribution of merchandise. That these warehouses perform an important public service is undisputed. The merchandise warehouse receives goods in carloads[4] and distributes them in smaller quantities to local jobbers or retailers, or reships them in less-than-carload lots to nearby destinations; issues negotiable and nonnegotiable receipts, provides insurance, and allows credit to be obtained on merchandise stored; provides recoopering, marking, and separation of varieties, and various incidental

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[3] Complainants take the position that the making of these allowances is in violation of section 1 of the Elkins Act and that similar allowances could not properly be made to them.

[4] There is a relatively small inbound movement in less than carloads.

clerical services. Warehouse services enable manufacturers to keep spot stocks for their customers; equalize production by steadily absorbing the manufacturers' output while eliminating heavy investment in reserve storage space; reduce freight charges and save time in transit through handling goods in carload quantities; reduce fire [fol. 242-c] risk and loss and damage claims; and eliminate the necessity of providing storage space at point of origin. Both complainants and the contract warehouses furnish these services.

The allowances complained of are cash payments made by defendants to the contract warehouses ostensibly for services rendered in connection with the loading and unloading of package freight.[5] Similar payments are not made to complainants. The conditions under which the allowances are given are set forth in several written agreements, of record herein, between defendants and the contract warehouses. The allowances made by the Pennsylvania are also stated in its tariff G. O.—I. C. C. No. 14400. The remaining defendants do not file tariffs covering their allowances to the contract warehouses. The evidence indicates that no allowances are made on traffic consigned to or by the contract warehouses as such. The form of billing customarily used in the consignment of goods to the contract warehouses is to a named party, care of the warehouse at which the carrier is to make delivery.

The allowances differ in amount and application according to the traffic. In certain instances they are applied to both carload and less-than-carload shipments, inbound and outbound, and in other instances they are given only on inbound carload shipments. They range from 2.5 cents per barrel on flour to 50 cents per ton on other freight. The Pennsylvania gives allowances on inbound and outbound carload and less-than-carload freight handled by the Merchants' Warehouse Company and on inbound carload and less-than-carload dairy freight handled by the Quaker City Cold Storage Company; the Baltimore & Ohio, on inbound and outbound carload freight handled by the Pennsylvania

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[5] The term "package freight" does not include automobiles or other motor vehicles.

Warehousing & Safe Deposit Company; and the Reading, on inbound carload freight handled by the Philadelphia Warehousing & Cold Storage Company and the Pennsylvania Warehousing & Safe Deposit Company. Neither the Baltimore & Ohio nor the Reading gives allowances to the contract warehouses on less-than-carload freight. No allowances are made by the Reading on outbound shipments. That the allowances are substantial in amount is indicated by the payments made by the Pennsylvania to the Merchants' Warehouse Company during 1927 of approximately $200,000.

Carload freight carried at carload rates is ordinarily loaded and unloaded by the owner or his agent. In this connection rule 27 of the official classification requires owners to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by [fol. 242-d] rail carriers, carried at carload ratings. By exceptions to the classification, however, defendants agree to load or unload carload package freight at certain Philadelphia freight stations, except when handled direct to or from cars on team tracks at owner's request. Defendants and interveners in their behalf assert that these freight stations include the facilities operated by the contract warehouses. The Pennsylvania and the Baltimore & Ohio have so provided in their tariffs, but the Reading has no similar tariff provision. The contract warehouses perform the work of loading and unloading carload package freight for defendants pursuant to the agreements heretofore mentioned.

Defendants' practice of loading and unloading carload freight at Philadelphia has been in effect for many years. According to the *the* Pennsylvania the practice first started in connection with the receipt and delivery of freight at water-front stations having no team-track facilities. In time the practice spread to include other Philadelphia stations, not only on the lines of the Pennsylvania but also on the Baltimore & Ohio and the Reading.

The services performed by the contract warehouses do not differ in substance from those rendered by complainants. The warehouses of complainants and those of the contract warehouses are served by private sidetracks or sidings connecting with the lines of one or more defendants. Both handle the same classes of freight and both

obtain business by widespread advertising in prominent trade publications, by sending letters, pamphlets, and circulars to prospective customers offering them in their services, and by personal solicitation. There is active and keen competition between complainants and the contract warehouses. Concerns using public-warehouse facilities generally select the company offering them the lowest aggregate charge for the distribution of their goods. By means of the allowances the contract warehouses are able to quote lower charges than can complainants.

Complainants urge, among other things, that the allowances are in fact rebates given for the purpose of buying freight traffic controlled by the contract warehouses and causing it to be transported over defendants' lines; that the facilities of the contract warehouses are not railroad freight stations or used by the general public as such; that the contract warehouses are the actual shippers of the freight handled by them; that the contract warehouses do not perform any task for defendants that entitle them to receive allowances; and that the loading and unloading of freight by the contract warehouses is not in fact transportation service and that allowances therefor, being for trade services, are illegal.

[fol. 242-e] Defendants take the position that under their tariffs they are required to load and unload carload and less-than-carload package freight at Philadelphia; that they lawfully employ the contract warehouses as agents to perform these loading and unloading services, and that the allowances paid therefor are compensation for such services; that there is no legal obligation on the part of defendants to make complainants' warehouses their stations or to employ complainants as their agents to load and unload freight; that the contract warehouses are neither consignors nor consignees of the freight handled by them; and that the allowances paid to such warehouses, being for transportation services rendered, are not illegal. The contentions of the contract warehouses and interveners in behalf of defendants are similar to those of defendants.

There is much conflicting testimony in the record with respect to the foregoing contentions. The weight of the evidence, however, supports those advanced by complainants. Among other things, the record is persuasive that the contract warehouses are compensated for the solicita-

tion of freight for movement over the lines of the respective defendants through the payment of the allowances in question; that traffic considerations have been the primary motive for the payment of these allowances; that the facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact public stations but are confined to the handling of merchandise for the patrons of the warehouses; and that the services performed by the contract warehouses in connection with the loading or unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are in fact performed for the benefit of the owner of the merchandise rather than for defendants.

While the contract warehouses are not the owners of the goods received or shipped by them, all of defendants' dealings are with these companies and none with the owners of the goods. As to many of the inbound carload shipments the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less-than-carload lots. The contract warehouses, even though not the owners of the goods, have been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses. The same is true as to complainants, shipments from and to their warehouses being handled in substantially the same manner.

[fol. 242-f] In McCormick Warehouse Co. v. Pennsylvania R. Co., 148 I. C. C. 299, wherein we found unlawful a similar situation at Baltimore, Md., we said at page 306:

While the Terminal is not the owner of the goods received and shipped by it, all of the dealings of defendants are with the Terminal and none with the owner of the goods. As to many of the inbound shipments the Terminal is the only party to whom delivery of the goods could be made as carload shipments, the real owners being out-of-town concerns which ship to the Terminal for distribution in less-than-carload lots. It is our view that the Terminal, even though not the owner of the goods, has been given

dominion over such goods for transportation purposes and that accordingly for transportation purposes it should be deemed the consignor of shipments from and consignee of shipments to its warehouses.

Although contention is here made it has not been shown that there is any distinction in substance as between that case and the case here considered. There, as here, the keystone of the defense is the tariff obligation to load and unload freight at the preferred warehouses. With this as a starting point, defendants then rely upon their right to select their own agencies to carry out their tariff obligations and their further right to limit themselves in that selection. Transfer in St. Louis and East St. Louis by Dray and Truck, 155 I. C. C. 129, 139-142. But where it is shown that an unlawful discrimination is being worked the mere fact that the machinery for working it is in tariff form can not afford it sanctity. It is fundamental that an unlawful discrimination practiced under authority of a tariff is just as evil as one which is practiced contrary to a tariff. When substance, and not mere form, is considered the conclusion is inescapable that the practices here complained of are unlawful.

In Terminal Warehouse Co. v. United States, 31 Fed. (2d) 951, the district court refused to set aside our order, holding that the allowances considered in the McCormick case were in violation of both sections 2 and 3 of the act.

Prior to the filing of exceptions to the examiner's proposed report all parties conceded that the facts and questions of law in the instant case were the same in substance as those in the McCormick case. In their exceptions and at the oral argument most of the parties opposed to the complaints receded from their position in this respect. The record is persuasive that there is no real distinction between these cases.

Complainants confine the basis of their claim for reparation to damages resulting from shrinkage or diminution of their normal business profits. They urge that they be permitted to submit proof of actual pecuniary loss at a further hearing to be held subsequent to the decision herein, contending that it would be impracticable to make such proof prior to the date the unjust discrimination and undue [fol. 242-g] prejudice is removed. We are not inclined to

this view. Complainants have been accorded ample opportunity to present facts supporting an award of reparation. Their case must stand or fall on the facts now of record. The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices. Damage must be shown with certainty to support an award of reparation under findings of unjust discrimination or undue prejudice. Penn. R. R. Co. v. International Coal Co., 230 U. S. 184, 206. Reparation is denied.

Following McCormick Warehouse Co. v. Pennsylvania R. Co,, supra, and upon this record, we find that the practice of defendants in making allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia as aforesaid, and refusing to make similar allowances to complainants for performing similar services, results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants. The record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses. It is apparent that the unjust discrimination and undue prejudice can lawfully be corrected only by terminating the allowances. Defendants will therefore be required to cease and desist from publishing or making such discriminatory and preferential allowances. The Pennsylvania and the Baltimore & Ohio will also be required to cancel their tariff provisions which make the facilities of the contract warehouses a part of the respective station facilities of these defendants at Philadelphia.

An appropriate order will be entered.

Commissioner Taylor did not participate in the consideration or disposition of this proceeding.

[fol. 242-h] Order

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, Division 3, Held at Its Office, in Washington, D. C., on the 28th Day of December, A. D. 1929

No. 20968

JAMES GALLAGHER, NORTHEASTERN WAREHOUSE COMPANY, Walter A. Bailey, and Terminal Warehouse Company

v.

THE PENNSYLVANIA RAILROAD COMPANY

No. 20968 (Sub.-No. 1)

WALTER A. BAILEY AND TERMINAL WAREHOUSE COMPANY

v.

THE BALTIMORE & OHIO RAILROAD COMPANY

No. 20968 (Sub-No. 2)

REX & COMPANY, INCORPORATED; JAMES GALLAGHER, Northeastern Warehouse Company, Walter A. Bailey, Terminal Warehouse Company, and Industrial Cold Storage and Warehouse Company

v.

READING COMPANY

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendant in No. 20968 be, and it is hereby, notified and required to cease, desist, and abstain, from publishing or making allowances to the Merchants' Warehouse Company and the Quaker City Cold Storage Company in connection with the loading or unloading of package freight at Philadelphia, Pa.

It is further ordered, That said defendant in No. 20968 be, and it is hereby, notified and required to cancel its tariff provisions which make the warehouses of said Merchants' [fol. 242-i] Warehouse Company and said Quaker City Cold Storage Company a part of said defendant's station facilities at Philadelphia, Pa.

It is further ordered, That the above-named defendant in No. 20968 (Sub-No. 1) be, and it is hereby, notified and required to cease, desist, and abstain, from publishing or making allowances to the Pennsylvania Warehousing & Safe Deposit Company in connection with the loading or unloading of package freight at Philadelphia, Pa.

It is further ordered, That said defendant in No. 20968 (Sub-No. 1) be, and it is hereby, notified and required to cancel its tariff provisions which make the warehouses of said Pennsylvania Warehousing & Safe Deposit Company a part of said defendant's station facilities at Philadelphia, Pa.

It is further ordered, That the above-named defendant in No. 20968 (Sub-No. 2) be, and it is hereby, notified and required to cease, desist, and abstain, from publishing or making allowances to the Pennsylvania Warehousing & Safe Deposit Company and the Philadelphia Warehousing & Cold Storage Company in connection with the unloading of package freight at Philadelphia, Pa.

And it is further ordered, That this order shall become effective on February 10, 1930, and that defendants shall comply therewith upon not less than one day's notice to this commission and to the general public by filing and posting tariffs in the manner prescribed in section 6 of the interstate commerce act, and that this order shall remain in force until the further order of the commission in the premises.

By the Commission, Division 3.

George B. McGinty, Secretary. (Seal.)

[fol. 243] Filed Jan. 30, 1930. R. H. Interstate Commerce Commission

Original

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 20968

JAMES GALLAGHER et al.

vs.

PENNSYLVANIA RAILROAD COMPANY

PETITION OF MERCHANTS WAREHOUSE COMPANY FOR A REHEARING OR REARGUMENT BEFORE THE FULL COMMISSION AND FOR THE POSTPONEMENT OF EFFECTIVE DATE OF THE ORDER

William A. Glasgow, Jr., M. Hampton Todd, Attorneys for Petitioner.

Philadelphia, January 28, 1930.

[fol. 244] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 20968

JAMES GALLAGHER et al.

vs.

PENNSYLVANIA RAILROAD COMPANY

PETITION OF MERCHANTS WAREHOUSE COMPANY FOR A REHEARING OR REARGUMENT BEFORE THE FULL COMMISSION AND FOR THE POSTPONEMENT OF EFFECTIVE DATE OF THE ORDER

Comes now the Merchants Warehouse Company, an Intervener in the above entitled proceeding, and respectfully petitions the Commission to grant a rehearing or reargument therein before the whole Commission, and in support of said petition respectfully shows:

1. The case was argued on November 27th, 1929, before Division 3. The report of the Commission was made by

Commissioner Porter, in which Commissioner Aitchison concurred. Commissioner Taylor did not participate in the consideration or disposition of this proceeding.

2. A question similar in some respects to the question [fol. 245] here involved, and differing in other respects, was presented in the case of McCormick Warehouse Company vs. Pennsylvania Railroad Company, 95 I. C. C. 301, 148 I. C. C. 299, which was decided by Division 4,—Commissioners Meyer, Eastman and Woodlock. A petition to enjoin and set aside the Order of the Commission in the McCormick Warehouse case was denied by a Statutory Court in Terminal Warehouse Company vs. United States, 31 Fed. (2nd) 951.

3. The decision of Division 3 in this case is erroneous in the following particulars:

(a) The Division held that the facilities of the Contract Warehouses were only nominally open to the general public as railroad freight stations, but were not in fact public stations in that they were confined to the handling of merchandise for the patrons of the Warehouse; whereas the fact is that the Contract Warehouses are both nominally and actually public stations open to the general public, and they are and have been for many years actually used by the public.

(b) Division 3 held that the services performed by the Contract Warehouses in connection with the loading and unloading of freight are in fact performed for the benefit of the owners of the merchandise rather than for the railroad; whereas, the actual fact is that the said services, although they may be "performed for the benefit of the owners of the merchandise" in the same sense as any other transportation service benefits the owners of the merchandise, were rendered as agents of the Railroad Company to perform a distinctly transportation service.

[fol. 246] (c) Division 3 held that the Contract Warehouses had been given dominion over goods for transportation purposes and accordingly for transportation purposes they should be deemed consignors of shipments from, or consignees of shipments to their warehouses; whereas the fact is that the goods were delivered to them by the Rail-

road Companies for the rendition of a transportation service which the Railroads have held themselves out to perform.

(d) Division 3 held that the practice of defendants in making allowances to the Contract Warehouses in connection with the loading or unloading of package freight at Philadelphia, and refusing to make similar allowances to the Complainants, resulted in unjust discrimination, in undue preference to the Contract Warehouses, and in undue prejudice to Complainants. Such discrimination, preference or prejudice, if it existed, could be removed by either giving allowances to all or denying them to all, but the Complainant specifically charges that the allowances are illegal and must be refused. This shows that the essence of the claim is not one of undue pre-erence and the Division should, therefore, have so found.

(e) Division 3 finds that the allowances are nothing more than a device or attempt to lend legality to the payment of rebates to the Contract Warehouses; whereas in fact there is no rebate paid. A rebate is a deduction from the published freight rate which finds its way to the pocket of the owner of the freight, whereas it is not contended here, and there is no evidence to support such a contention if it were made, that any of these payments are made to the owners of the freight.

[fol. 247] (f) Division 3 should have found that the service for which the allowances were made, to-wit, the loading and unloading of freight, was a transportation service within the meaning of Section 1 of the Interstate Commerce Act, and that the Contract Warehouses in performing that service were performing a transportation service as an agent of the Railroad.

(g) Division 3 should have found that there can be no undue preference, within the meaning of Section 3 of the Act, to an agent of the Railroad rendering a transportation service, nor can there be undue prejudice to any person desiring to render such a transportation service and to be paid for it by the Railroad, nor can there be unjust discrimination within the meaning of Section 2 of the Act between two persons desiring to render transportation services.

(h) Division 3 should have found that petitioner was neither the consignor nor the consignee nor the owner of any of the freight on which unloading payments are made and that therefore the payments were legal, and were not prohibited by any provisions of the Interstate Commerce Act bearing on payments by carriers to consignors, consignees, shippers or owners of freight.

4. The arrangement between Petitioner and the Pennsylvania Railroad Company has been in effect in Philadelphia for forty years and is of great importance to the public and to the Petitioner.

5. A disturbance of the present arrangement during pendency of this case would cause great inconvenience and irreparable injury to the shipping public of Philadelphia, [fol. 248] and would do great damage to your Petitioner:

Wherefore Petitioner prays that a rehearing or reargument before the full Commission be granted in the above entitled case, and that pending such rehearing or reargument the effective date of the Order be postponed, or the Order suspended or stayed, and that the Commission enter such further Order or Orders in the premises as to it may seem reasonable and just.

Merchants Warehouse Company, by George M. Richardson, General Manager. George M. Richardson, Wm. A. Glasgow, Jr., M. Hampton Todd, Counsel for Petitioner, 1018 Real Estate Trust Bldg., Philadelphia, Penna.

Dated at Philadelphia, Pennsylvania, January 28th, 1930.

[fol. 249] Filed Jan. 30, 1930. Interstate Commerce Commission. H. R.

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 20968 (Sub. No. 1)

WALTER A. BAILEY and TERMINAL WAREHOUSE COMPANY, Complainants,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY

I. C. C. Docket No. 20968 (Sub. No. 2)

REX & COMPANY, INC., et al., Complainants,

vs.

READING COMPANY

PETITION OF PHILADELPHIA WAREHOUSING AND COLD STORAGE COMPANY FOR REHEARING OR REARGUMENT BEFORE THE FULL COMMISSION AND FOR THE POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER OF THE COMMISSION

John P. Connelly, 1526 Land Title Bldg., Philadelphia, Pa., Attorney for Petitioner.

Dated, January 29, 1930.

[fol. 250] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 20968 (Sub. No. 1)

WALTER A. BAILEY and TERMINAL WAREHOUSE COMPANY, Complainants,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY

I. C. C. Docket No. 20968 (Sub. No. 2)

REX & COMPANY, INC., et al., Complainants,

vs.

READING COMPANY

PETITION OF PHILADELPHIA WAREHOUSING AND COLD STORAGE COMPANY FOR REHEARING OR REARGUMENT BEFORE THE FULL COMMISSION AND FOR THE POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER OF THE COMMISSION

And now comes the Philadelphia Warehousing & Cold Storage Company, Intervener in the above entitled pro-
[fol. 251] ceedings, and respectfully petitions the Commission to grant a rehearing or reargument before the whole Commission, and in support of said petition, respectfully shows:

1. The case was argued on November 27th, 1929, before Division 3. The report of the Commission was made by Commissioner Porter, in which Commissioner Aitcheson concured. Commissioner Taylor did not participate in the consideration or disposition of this proceeding.

2. A question similar in some respects to the question here involved, and differing in some respects, was presented in the case of McCormick Warehouse Company vs. Pennsylvania Railroad Company, 95 I. C. C. 301, 148 I. C. C. 299, which was decided by Division 4—Commissioners Meyer, Eastman and Woodlock. A petition to enjoin and set aside the Order of the Commission in the McCormick Warehouse case was denied by a Statutory Court in Terminal Warehouse Company vs. United States, 31 Fed. (2nd) 951.

3. The decision of Division 3 in this case is erroneous in the following particulars:

(a) The Division held that the facilities of the Contract Warehouses were only nominally open to the general public as railroad freight stations, but were not in fact public stations in that they were confined to the handling of merchandise for the patrons of the Warehouses. Whereas the fact is that Contract Warehouses are both nominally and actu- [fol. 252] ally public stations open to the general public, and they are and have been for many years actually used by the public.

(b) Division 3 held that the services performed by the Contract Warehouses in connection with the loading and unloading of freight are in fact performed for the benefit of the owners of the merchandise rather than for the railroads. Whereas the actual fact is that the said services, although they may be "performed for the benefit of the owners of the merchandise" in the same sense as any other transportation service benefits the owners of the merchandise, were rendered as agents of the Railroad Company to perform a distinctly transportation service.

(c) Division 3 held that the Contract Warehouses had been given dominion over goods for transportation purposes and accordingly for transportation purposes they should be deemed consignors of shipments from, or con-

signees of shipments to their warehouses. Whereas the fact is that the goods were delivered to them by the Railroad Companies for the rendition of a transportation service which the Railroads have held themselves out to perform.

(d) Division 3 held that the practice of Defendants in making allowances to the Contract Warehouses in connection with the loading or unloading of package freight at Philadelphia, and refusing to make similar allowances to the Complainants, resulting in unjust discrimination, in undue preference to the Contract Warehouses, and in undue prejudice to Complainants. Such discrimination, prefer- [fol. 253] ence or prejudice, if it existed, could be removed by either giving allowances to all or denying them to all, but the Complainants specifically charges that the allowances are illegal and must be refused. This shows that the essence of the claim is not one of undue preference and the Division should, therefore, have so found.

(e) Division 3 finds that the allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the Contract Warehouses. Whereas in fact there is no rebate paid. A rebate is a deduction from the published freight rate which finds its way to the pocket of the owner of the freight, whereas it is not contended here, and there is no evidence to support such a contention if it were made, that many of these allowances are paid to the owners of the freight.

(f) Division 3 should have found that the service for which the allowances were made, to-wit, the loading and unloading of freight, was a transportation service within the meaning of Section 1 of the Interstate Commerce Act, and that the Contract Warehouses in performing that service were performing a transportation service as an agent of the Railroad.

(g) Division 3 should have found that there can be no undue preference within the meaning of Section 3 of the Act to an agent of the Railroad rendering a transportation service, nor can there be undue prejudice to any person desiring to render such a transportation service and to be paid for it by the Railroad, nor can there be unjust discrimination

[fol. 254] within the meaning of Section 2 of the Act between two persons desiring to render transportation services.

4. The arrangement between Petitioner and the Reading Company has been in effect in Philadelphia for 39 years and is of great importance to the public and to the Petitioner.

5. A disturbance of the present arrangement during pendency of this case would cause great inconvenience and irreparable injury to the shipping public of Philadelphia, and would do great damage to your Petitioner.

Wherefore Petitioner prays that a rehearing or reargument before the full Commission be granted in the above entitled case, and that pending such rehearing or reargument the effective date of the Order be postponed, or the Order suspended or stayed, and that the Commission enter such further Order or Orders in the premises as to it may seem reasonable and just.

Philadelphia Warehousing & Cold Storage Company, by J. A. Geisz, J. A. Geisz, President. John P. Connelly, Counsel for Petitioner, #1526-27 Land Title Bldg., Phila., Pa.

Dated at Philadelphia, January 29, 1930.

[fol. 255] Original

Filed Jan. 30, 1930. Interstate Commerce Commission. H. R.

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968 Sub. No. 1

WALTER A. BAILEY and TERMINAL WAREHOUSE COMPANY, Complainants,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, Defendant

Docket No. 20968 Sub. No. 2

REX AND COMPANY, INC., et al, Complainants,

vs.

READING COMPANY, Defendant

PETITION OF PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY FOR A REHEARING BEFORE THE FULL COMMISSION AND FOR THE POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

H. Edgar Barnes, Attorney for Pennsylvania Warehousing and Safe Deposit Company.

January 28, 1930.

[fol. 256] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 20968 (Sub. No. 1)

WALTER A. BAILEY and TERMINAL WAREHOUSE COMPANY, Complainants,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY

I. C. C. Docket No. 20968 (Sub. No. 2)

REX AND COMPANY, INC., et al., Complainants,

vs.

READING COMPANY

PETITION OF PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY FOR REHEARING OR REARGUMENT BEFORE THE FULL COMMISSION AND FOR THE POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

Comes now the Pennsylvania Warehousing and Safe Deposit Company, Intervener in the above entitled cases, and respectfully petitions the Commission to grant a rehearing or reargument therein before the full Commission, and in support of said petition respectfully shows:

1. The above cases were decided on December 28th, 1929, by Division 3 of the Commission. The report of the Com-

[fol. 257] mission was made by Commissioner Porter, in which Commissioner Aitchison concurred. Commissioner Taylor did not participate in the consideration or disposition of these cases.

2. In the case of McCormick Warehouse Company vs. Pennsylvania Railroad Company, 95 I. C. C. 301, 148 I. C. C. 299, which was decided on November 27th, 1928, by Division 4,—Commissioners Meyer, Eastman and Woodlock, there were presented for decision some facts present in the instant case, but nevertheless differing herefrom in many vital particulars. The questions involved herein, however, have never been submitted to or passed upon by the full Commission. Because of the importance of these questions, and the vast public interests affected, it is deemed proper and essential that the cases be submitted to and decided by the full Commission.

3. The matters erroneously decided in the report of Division 3 are as follows:

(a) (On Sheet No. 3): "The allowances complained of are cash payments made by defendants to the contract warehouses ostensibly for services rendered in connection with the loading and unloading of package freight".

The payments made to Petitioner are not ostensibly for services rendered, but are made for actual transportation services and valuable facilities afforded to the Baltimore and Ohio Railroad Company, and to the Reading Company. With respect to inbound freight, this Petitioner inspects and breaks the seals of the cars, opens the doors, unloads the cars, tallies the contents thereof, makes note of any [fol. 258] damaged contents and reports the damage, overage or shortage of the contents to said Carriers. It carries insurance upon the goods and stores them for the period of forty-eight hours after arrival. It sends out arrival notices to the owners of the merchandise, and on behalf of the Carriers makes collection of the freight charges. With respect to outbound freight, it receives the merchandise at its warehouses, tallies it, inspects it for damage, loads it in the cars and then seals the cars. With respect to facilities afforded, it provides warehousing facilities and buildings at very great expense to accommodate the shipments received under the contracts. Such facilities represent a

capital investment of very large amount and expensive operating costs are incurred.

(b) (On Sheet No. 4): "There is much conflicting testimony in the record with respect to the foregoing contentions. The weight of the evidence, however, supports those advanced by complainants. Among other things, the record is persuasive that the contract warehouses are compensated for the solicitation of freight for movement over the lines of the respective defendants through the payment of the allowances in question; that traffic considerations have been the primary motive for the payment of these allowances; that the facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not in fact public stations but are confined to the handling of merchandise for the patrons of the warehouses; and that the services performed by the contract warehouses in connection with the loading or unloading of freight, including the sending of arrival notices, the collection of freight charges, and other incidental matters, are in fact performed for the benefit of the owner of the merchandise rather than for defendants."

[fol. 259] Petitioner does not control or solicit any freight traffic whatsoever, nor does it cause the same to be transported over the lines of the Baltimore and Ohio Railroad, or of the Reading Company, exclusively or in any other manner. Such relationship is utterly foreign to that which exists betwen this Petitioner and the two Carriers in question under the terms of the existing contracts. The facilities of Petitioner have been in fact open to the general public as public stations for many years, and are not confined to the handling of merchandise only for its own patrons. The services are performed for the benefit of the Carrier and not for the owner of the merchandise. If such services are finally discontinued, track and platform delivery will of necessity replace the present arrangement. The movement of railroad equipment will be retarded and there will result not only loss to the Carriers, but congestion, tardy clearance and distribution of freight at the railroad stations,—all matters of most serious detriment and disadvantage to Carriers and public alike. To duplicate and procure the facilities and warehouses, the use of which are afforded to the Carriers and the general public under the

existing contracts, would require an enormous investment in purchasing or leasing such convenient locations.

(c) (On Sheet No. 5:) "While the contract warehouses are not the owners of the goods received or shipped by them, all of defendants' dealings are with these companies and none with the owners of the goods. As to many of the inbound carload shipments the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less-than-carload lots. The contract ware-[fol. 260] houses, even though not the owners of the goods, have been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses. The same is true as to complainants, shipments from and to their warehouses being handled in substantially the same manner."

Petitioner has no dominion over the goods which are received, and loaded or unloaded and stored under these contracts. The fact is that every action taken, and everything done or attempted to be done by Petitioner in connection with the handling of carload package freight is performed only under actual instructions received from the Carriers, or from the owners of the merchandise. The name of the owner of the merchandise is always specifically set forth upon the railroad way bill. It is not a fact that all of the dealings of the Defendant Carriers are with Petitioner, and none with the owners of the goods, in respect to the merchandise received under the contracts at Petitioner's warehouses. On the contrary, the goods are delivered to Petitioner by the Carriers for the rendering of a transportation service, which the Carriers have held themselves out to the public as ready to perform. These services fall within the term "transportation" as defined in Section 1 of the Act to Regulate Commerce as follows:

"All services in connection with the receipt, delivery * * * storage and handling of the property transported".

(d) (On Sheet No. 5:) "With this as a starting point, defendants then rely upon their right to select their own

[fol. 261] agencies to carry out their tariff obligations and their further right to limit themselves in that selection. Transfer In St. Louis and East St. Louis by Dray and Truck, 155 I. C. C. 129, 139-142. But where it is shown that an unlawful discrimination is being worked the mere fact that the machinery for working it is in tariff form cannot afford it sanctity. It is fundamental that an unlawful discrimination practiced under authority of a tariff is just as evil as one which is practiced contrary to a tariff. When substance, and not mere form, is considered the conclusion is inescapable that the practices here complained of are unlawful".

The decision of the Supreme Court of the United States in the recent case of Brown and White Taxi Cab Company vs. Brown and Yellow Taxi Cab And Transfer Company, 72 Law. Ed. 383, and of this Commission in Transfer in St. Louis, etc. by Dray and Truck, 155 I. C. C. 129, sustained the right of the Carriers to select their own agents to carry out their transportation obligations.

(e) (On Sheet No. 6:) "Prior to the filing of exceptions to the examiner's proposed report all parties conceded that the facts and questions of law in the instance case were the same in substance as those in the McCormick case. In their exceptions and at the oral argument most of the parties opposed to the complaints receded from their position in this respect. The record is persuasive that there is no real distinction between these cases".

This case rests on its own particular facts. In the McCormick Case it was found as a fact that the Carrier had a large controlling ownership interest in the Warehouse Company, and that the Warehouse Company was an active [fol. 262] solicitor of freight over the lines of the Pennsylvania Railroad. In fact it controlled the routing of vast quantities of freight, and furthermore it was not intended that the warehouses there involved should be used by the general public as stations of the Railroad for the receipt and delivery of merchandise.

(f) (On Sheet No. 6:) "Following McCormick Warehouse Co. vs. Pennsylvania R. Co., supra, and upon this record, we find that the practice of defendants in making

allowances to the contract warehouses in connection with the loading or unloading of package freight at Philadelphia as aforesaid, and refusing to make similar allowances to complainants for performing similar services, results in unjust discrimination, in undue preference of the contract warehouses, and in undue prejudice to complainants. The record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses. It is apparent that the unjust discrimination and undue prejudice can lawfully be corrected only by terminating the allowances. Defendants will, therefore be required to cease and desist from publishing or making such discriminatory and preferential allowances. The Pennsylvania and the Baltimore and Ohio will also be required to cancel their tariff provisions which make the facilities of the contract warehouses a part of the respect station facilities of these defendants at Philadelphia".

It is not true that the payments made to this Petitioner are rebates, but the same are in fact compensation for services rendered and facilities actually afforded. They are not devices to lend legality to the payment of rebates, as this Petitioner has no interest, directly or indirectly, in [fol. 263] any of the merchandise which it handles under said contracts. No unjust discrimination and undue prejudice result to Complainants by reason of the fact that the Carrier selects Petitioner to render part of its transportation services for which it makes payment, instead of selecting another agent for the same service.

(g) (Order—On Sheet No. 2:) It is further ordered, That the above-named defendant in No. 20968 (Sub. No. 1) be, and it is hereby, notified and required to cease, desist, and abstain from publishing or making allowances to the Pennsylvania Warehousing & Safe Deposit Company in connection with the loading or unloading of package freight at Philadelphia, Pa.

It is further ordered, That said defendant in No. 20968 (Sub. No. 1) be, and it is hereby, notified and required to cancel its tariff provisions which make the warehouses of the said Pennsylvania Warehousing & Safe Deposit Company a part of said defendant's station facilities at Philadelphia, Pa.

It is further ordered, That the above-named defendant in No. 20968 (Sub. No. 2) be, and it is hereby, notified and required to cease, desist and abstain from publishing or making allowances to the Pennsylvania Warehousing and Safe Deposit Company and the Philadelphia Warehousing & Cold Storage Company in connection with the unloading of package freight at Philadelphia, Pa.

It is respectfully submitted that the above mentioned Orders of the Commission were based upon a misapprehension of the facts of the case.

Wherefore Petitioner prays that a rehearing before the full Commission be granted in the above entitled cases, and that pending such rehearing the effective date of the Order be postponed, stayed or suspended from February [fol. 264] 10th, 1930, and that the Commission enter such further Order or Orders in the premises as to it shall seem reasonable and just.

Pennsylvania Warehousing and Safe Deposit Company, by John A. McCarthy, John A. McCarthy, President. Attest: E. W. Oescher, E. W. Oescher, Secretary, 113 South Third Street, Philadelphia, Pennsylvania. (Seal.) H. Edgar Barnes, Counsel for Petitioner, 518 Real Estate Trust Bldg.

Dated at Philadelphia, Penna., January 28th, 1930.

[fol. 265] Original

Filed Jan. 31, 1930. Interstate Commerce Commission. H. R.

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket #20968

JAMES GALLAGHER et al.

v.

PENNSYLVANIA RAILROAD COMPANY

Docket #20968, Sub. No. 1

WALTER A, BAILEY et al.

v.

BALTIMORE AND OHIO RAILROAD COMPANY

Docket #20968, Sub. No. 2

REX AND COMPANY, INCORPORATED,

v.

READING COMPANY.

PETITION OF PHILADELPHIA TRADE BODIES FOR A REHEARING OR REARGUMENT BEFORE THE FULL COMMISSION AND FOR THE POSTPONEMENT OF EFFECTIVE DATE OF ORDER

Allen S. Olmsted, 2nd, William A. Glasgow, Jr., Attorneys for Petitioners.

Philadelphia, January 28, 1930.

[fol. 266] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968

JAMES GALLAGHER et al.

vs.

PENNSYLVANIA RAILROAD COMPANY

Docket No. 20968 (Sub. No. 1)

WALTER A. BAILEY et al.

vs.

BALTIMORE AND OHIO RAILROAD COMPANY

Docket No. 20968 (Sub. No. 1)

REX AND COMPANY, INCORPORATED,

vs.

READING COMPANY

Docket No. 20968 (Sub. No. 2)

PETITION OF PHILADELPHIA TRADE BODIES FOR A REHEARING OR REARGUMENT BEFORE THE FULL COMMISSION AND FOR THE POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

Comes now the Commercial Exchange of Philadelphia, Grocers' and Importers' Exchange of Philadelphia, Phila-

delphia Board of Trade, Philadelphia Bourse, and the As-
[fol. 267] sociation of Manufacturers' Representatives, Incorporated, Intervenors in the above entitled cases, and respectfully petition the Commission to grant a rehearing or reargument before the full Commission, and in support of said Petition respectfully show:

1. Petitioners are organized to protect and advance the commercial and business interests of their members, and the business interests of Philadelphia. Among them they represent substantially all of the organized commercial interests of Philadelphia, who use the warehouses of the Complainants as well as of the Contract Warehouses. No merchant doing business in Philadelphia intervened in this case or testified on behalf of the Complainants.

2. The arrangements which the Commission's Order in this case would prohibit, have been in effect for many years, in some cases over forty years, and have been widely used by the merchants of Philadelphia, and are of great value to them. An interruption of them would do great and irreparable damage to the shipping community of Philadelphia.

3. The decision of Division 3 is erroneous in the following particulars:

(a) Division 3 found in effect that the Complainants and the Contract Warehouses were the real shippers or consignees of the freight, whereas the actual fact is that the merchants of Philadelphia on the one hand, and their purchasers, sellers, or principals on the other hand, are the real consignees and consignors. They are the owners of the freight and as such they patronize both the Complainant Warehouses and the Contract Warehouses.

[fol. 268] (b) Division 3 found in effect that there is no difference between this case and the McCormick Warehouse Company vs. Pennsylvania Railroad Company, 148 I. C. C. 299, whereas, in the McCormick Warehouse case the merchants of Baltimore took no part and made no showing as to their interests. In this case the merchants of Philadelphia have intervened, asking that the arrangements be continued and pointing out wherein the public interests are served by the arrangement.

(c) Division 3 failed to give weight to the fact that the public interests, and the conveniences of trade are served by a continuance of this arrangement, and that any damage to the Complainants is incidental to the fact that they have not been chosen by the Railroad Companies as their agents to render the services which are of value to the public.

4. If the payments for unloading now made to the Contract Warehouses are cancelled, the charge for unloading will, as your Petitioners fear be saddled on the public, and result in an increase in the freight rate amounting to as much as 2½ cents per hundred pounds. The arrangement at New York which continues to exist, provides for an unloading service by the Railroads, so that the elimination of the payments for unloading will in effect wipe out the long existing port differential between New York and Philadelphia on the commodities which are warehoused. This is notably true of flour, and the damage caused to Philadelphia's traffic in that commodity will be especially acute.

Wherefore Petitioners pray that a rehearing or reargument before the full Commission be granted in the above entitled cases, and that pending the disposition of the said [fol. 269] rehearing or reargument the effective date of the Order be postponed, or the Order suspended or stayed, and that the Commission enter such further Order or Orders in the premises as it shall deem reasonable and just.

Commercial Exchange of Philadelphia, Grocers' and Importers' Exchange of Philadelphia, Philadelphia Board of Trade, Philadelphia Bourse, Association of Manufactureres' Representatives, Incorporated, by Wm. A. Glasgow, Jr., Wm. A. Glasgow, Jr., C. S., Attorney. Allen S. Olmsted, 2nd, 2301 Packard Bldg., Phila., Pa.; Wm. A. Glasgow, Jr., 1018 Real Estate Trust Bldg., Phila, Pa., Counsel for Petitioners.

Dated at Philadelphia, Pennsylvania, January 28th, 1930.

[fol. 270] Original

Filed Feb. 1, 1930, Interstate Commerce Commission. H. R.

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968

GALLAGHER et al.

vs.

THE PENNSYLVANIA RAILROAD COMPANY

Docket No. 20968, Sub. 1

BAILEY et al.

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY

Docket No. 20968, Sub. 2

REX AND COMPANY, INC., et al.

vs.

READING COMPANY

ANSWER OF THE COMPLAINANTS TO THE VARIOUS PETITIONS FOR REHEARING OR REARGUMENT, ETC., FILED BY SEVERAL INTERVENERS

By John J. Hickey, Attorney for Complainants.

Washington, D. C., February 1, 1930.

[fol. 271] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968

GALLAGHER et al.

vs.

THE PENNSYLVANIA RAILROAD COMPANY

Docket No. 20968, Sub. 1

BAILEY et al.

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY

Docket No. 20968, Sub. 2

REX AND COMPANY, INC., et al.

vs.

READING COMPANY

ANSWER OF THE COMPLAINANTS TO THE VARIOUS PETITIONS FOR REHEARING OR REARGUMENT, ETC., FILED BY SEVERAL INTERVENERS

The complainants, in answer to the said petitions, submit that each of the petitions should be denied.

The petitioners seek rehearing or reargument of the cases before the whole Commission and postponement of the effective date of the order of Division 3. The petitioners are the Merchants Warehouse Company, the Penn-[fol. 272] sylvania Warehousing and Safe Deposit Company, receivers of the unlawful rebates, and several other interveners who are either receivers of the rebates or beneficiaries thereof. Prolongation of the litigation before the Commission or in the Courts, attended by continuance of the rebates, will be very profitable to the petitioners and correspondingly injurious to the complainants. The complaints were filed on April 26, 1928. It appears, therefore, that these cases have been on the Commission's formal docket for a period of 21 months.

Concerning the requests for rehearing or reargument. The defendants and interveners were granted 67 days to prepare their defense after the evidence of the complainants was submitted at the public hearing. Those parties had, and took, ample opportunity to present their evidence and to argue the cases. Their petitions do not show grounds sufficient to entitle them to either rehearing or reargument and, therefore, rehearing or reargument should not be granted.

Concerning the request of the petitioners for postponement of the effective date of the order of Division 3. These cases have been argued at length in our briefs of December 6, 1928, and July 20, 1929. We will not repeat that argument here. The records of congressional committees, the reports of those committees and the debates in Congress leading to the enactment of Section 2 of the Interstate Commerce Act and the Elkins Act, will reveal the congressional conception of the most corrupt and pernicious rebate and that the principal ingredients are (1) traffic buying [fol. 273] motive of the carrier, (2) an agreement compelling the shipper of freight traffic to route his traffic over the lines of the carrier giving the rebates, (3) a large tonnage of freight with correspondingly large aggregate of rebates, as a reward for such routing, (4) unjust discrimination reflected in injury to the business of competing shippers. And the statutory provisions referred to reflect that conception. A review of the record in the cases at hand discloses proof that measures up to the congressional conception of the most injurious rebate. No tribunal has authority to set aside the application of Section 2 of the Interstate Commerce Act or Section 1 of the Elkins Act. The petitions which, through requesting postponement of the effective date of the order of Division 3, in substance are seeking a license authorizing the petitioners to continue to violate criminal statutes should be denied.

The complainants, therefore, respectfully urge that each of the petitions of the interveners be denied.

A copy of this answer has been mailed to each party of record.

Respectfully submitted.

J. J. Hickey, John J. Hickey, 800 Southern Building, Washington, D. C., Attorney for Complainants.

Washington, D. C., February 1, 1930.

[fols. 274-283] Original

Filed Feb. 6, 1930, Interstate Commerce Commission. H. R.

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968

JAMES GALLAGHER ET AL.

vs.

PENNSYLVANIA RAILROAD COMPANY

Docket No. 20968, Sub. No. 1

WALTER A. BAILEY ET AL.

vs.

BALTIMORE AND OHIO RAILROAD COMPANY

Docket No. 20968, Sub. No. 2

REX AND COMPANY INCORPORATED,

vs.

READING COMPANY

ANSWER OF MILLERS' NATIONAL FEDERATION TO THE SEVERAL PETITIONS FOR POSTPONEMENT OF EFFECTIVE DATE OF ORDER AND FOR A REHEARING OR REARGUMENT BEFORE THE ENTIRE COMMISSION

Herbert J. Campbell, Attorney for Millers' National Federation, 105 South La Salle Street, Chicago, Illinois.

Chicago, February 4, 1930.

[fol. 284] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 20968

JAMES GALLAGHER ET AL.

vs.

PENNSYLVANIA RAILROAD COMPANY

Docket No. 20968, Sub. No. 1

WALTER A. BAILEY ET AL.

vs.

BALTIMORE AND OHIO RAILROAD COMPANY

Docket No. 20968, Sub. No. 2

REX AND COMPANY, INCORPORATED

vs.

READING COMPANY

ANSWER OF MILLERS' NATIONAL FEDERATION TO THE SEVERAL PETITIONS FOR POSTPONEMENT OF EFFECTIVE DATE OF ORDER AND FOR A REHEARING OR REARGUMENT BEFORE THE ENTIRE COMMISSION

Comes now Millers' National Federation, intervener in the above entitled cases, and respectfully submits that the petitions filed herein by Merchants Warehouse Company, Pennsylvania Warehousing and Safe Deposit Company and Philadelphia Trade Bodies for postponement of effectives date of order and for rehearing or reargument before the entire Commission, and each of them, should be denied for the following reasons:

(1) The issues involved herein are identical with the issues in the case of McCormick Warehouse Company v. [fol. 285] Pennsylvania Railroad Company, 148 I. C. C. 299, and the decision of Division 4 in that case is controlling here.

(2) The decision of Division 4 in McCormick Warehouse Company v. Pennsylvania Railroad Company, supra, was upheld by the United States District Court in the case of Terminal Warehouse Co. v. United States, 31 Fed. 2d, 951, wherein the court held that the allowances in question constituted rebates in violation of Section 2 of the Interstate Commerce Act.

(3) If the allowances paid by the railroads in the instant cases are rebates then the granting of a postponement of the effective date of the order of Division 3 would be tanto-

mount to the granting of a license to violate the Interstate Commerce Act.

(4) The petitions do not show grounds sufficient to entitle petitioners to a postponement of the effective date of the order, nor do they, nor any of them, show sufficient grounds to entitle petitioners, or any of them, to a rehearing or reargument before the entire Commission.

(5) The granting of the petitions for postponement of the effective date of the order of Division 3 would be prejudicial to the interests of the members of the Millers' National Federation in that it would permit the continuance of practices which have been shown of record herein to be harmful to their interests.

Wherefore this intervener, Millers' National Federation, [fol. 286] prays that said petitions, and each of them, be denied.

Respectfully submitted.

Herbert J. Campbell, Herbert J. Campbell, 105 South La Salle Street, Chicago, Illinois, Attorney for Intervener Millers' National Federation.

Chicago, Illinois, February 4, 1930.

[fol. 287] Received Feb. 5, 1930, Section of Dockets

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 3, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE FIFTH DAY OF FEBRUARY A. D. 1930

No. 20968

JAMES GALLAGHER et al.

v.

PENNSYLVANIA RAILROAD COMPANY

No. 20968 (Sub. No. 1)

WALTER A. BAILEY et al.

v.

BALTIMORE & OHIO RAILROAD COMPANY

No. 20968 (Sub. No. 2)

REX & COMPANY, INC., et al.

v.

READING COMPANY

ORDER

Upon consideration of petition from Philadelphia trade bodies and various intervenors for postponement of the effective date of the order, and upon further consideration of the record in the above entitled proceedings:

It is ordered, That the effective date of the order herein of December 28, 1929, be and it is hereby postponed from February 10 to February 25, 1930, upon one day's notice to the Commission, and to the general public.

It is further ordered, That in all other respects said order of December 28, 1929, shall remain in full force and effect.

By the commission, Division 3.

George B. McGinty, Secretary. (Seal.)

[fol. 288] Received Feb. 12, 1930, Section of Dockets

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 10TH DAY OF FEBRUARY, A. D. 1930

No. 20968

JAMES GALLAGHER et al.

v.

PENNSYLVANIA RAILROAD CO.

No. 20968 (Sub. No. 1)

WALTER A. BAILEY et al.

v.

BALTIMORE & OHIO R. R. Co.

No. 20968 (Sub. No. 2)

REX & COMPANY, INC., et al.

v.

READING COMPANY

ORDER

Upon consideration of petitions of the Pennsylvania Warehouse and Safe Deposit Company, Philadelphia Warehouse and Cold Storage Company, Merchants Warehouse Company, and of Philadelphia Trade Bodies, for rehearing or reargument before the Commission, and of complainants' reply thereto; and upon further consideration of the record in the above entitled proceedings:

It is ordered, That the said petitions be, and they are, hereby, denied.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 289] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 5781

THE MERCHANTS WAREHOUSE COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Respondents

In Equity. No. 5789

THE PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Respondents

In Equity. No. 5791

THE PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, Petitioner,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Respondents

Statement of Evidence—Filed Jan. 7, 1931

These causes came on for hearing of applications filed by each of the petitioners for a temporary stay of the commission's order on February 21, 1930, before the Honorable Victor B. Woolley, Circuit Judge, Honorable J. W. Thompson, and Honorable Oliver B. Dickinson, District Judge. [fol. 290] The petitioner in No. 5781 was represented by its solicitors Allen S. Olmsted, 2nd. and M. Hampton Todd; the petitioner in No. 5789 by its solicitors H. Edgar Barnes and Owen J. Roberts; the petitioner in No. 5791 by its solicitor John P. Connelly; the plaintiff interveners by their solicitor Allen S. Olmsted, 2nd. The United States of America was represented by Elmer B. Collins, Special Assistant to the Attorney General; the Interstate Commerce Commission by J. Stanley Payne, its Assistant Chief Counsel; the defendant interveners by their solicitor John J. Hickey.

Thereupon GEORGE M. RICHARDSON was called as a witness in behalf of petitioner in No. 5781 and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Todd:

I am General Manager and Treasurer of the Merchants Warehouse Company. The aggregate of the compensation paid us for service rendered, by the Pennsylvania Railroad, under the terms of our contracts with them for the years 1926 to 1929, inclusive was

1926	$142,149.12
1927	156,958.17
1928	143,485.93
1929	129,738.81
Total	$572,332.03

(No cross-examination.)

Thereupon Edward W. Obscher was called as a witness in behalf of petitioner in No. 5789 and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Roberts:

[fol. 291] I am secretary and treasurer of the Pennsylvania Warehousing and Safe Deposit Company. The amounts received by our company from the Reading Company under our contract for services to that company are:

April to December,	1926	$24,501.24
	1927	28,620.45
	1928	27,975.64
	1929	28,841.07

The sums paid by the Baltimore & Ohio Railroad during the same periods are:

April to December,	1926	$9,866.03
	1927	12,770.37
	1928	9,962.47
	1929	9,639.34

(No cross-examination.)

Thereupon Jacob A. Geisz was called as a witness in behalf of petitioner in No. 5791 and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Connelly:

I am with the Philadelphia Warehousing & Cold Storage Company. I have prepared a memorandum of the payments made to us for services rendered to the Reading Company. They were:

Year ending March 31,	1926	$19,727.39
	1927	21,908.18
	1928	20,992.42
	1929	22,406.93

(No cross-examination.)

[fol. 292] Thereupon there was offered and received in evidence in behalf of each of the three petitioners jointly a certified copy of proceedings before the Interstate Commerce Commission in James Gallagher, et al. vs. The Pennsylvania Railroad Company, Docket No. 20968; Walter A. Bailey, et al. vs. The Baltimore & Ohio Railroad Company, Docket No. 20968, Sub. No. 1; and Rex & Company, Inc. et al. vs. Reading Company, Docket No. 20968, Sub. No. 2, including a transcript of the testimony and the exhibits introduced in evidence in said proceedings, of which transcript the following is a condensed statement in narrative form:

[fol. 293] OFFER IN EVIDENCE

No. 20968

JAMES GALLAGHER et al., Complainants,

v.

PENNSYLVANIA RAILROAD COMPANY, Defendant

No. 20968 (Sub. No. 1)

WALTER A. BAILEY and TERMINAL WAREHOUSE COMPANY, Plaintiffs,

v.

BALTIMORE & OHIO RAILROAD COMPANY, Defendant

No. 20968 (Sub. No. 2)

REX AND COMPANY, INC., et al., Complainants,

v.

READING COMPANY, Defendant

NARRATIVE OF THE EVIDENCE BEFORE THE INTERSTATE COMMERCE COMMISSION

[fol. 294] Room 1103 I. C. C. Building,

Washington, D. C., Monday, July 30, 1928.

The above entitled matters came on for hearing, pursuant to notice, at 10 o'clock a. m., before Examiner R. M. Brown.

Mr. John J. Hickey, 800 Southern Building, Washington, D. C., appearing for complainants:

Mr. Henry Wolf Bikle, 225 Broad Street Station, Philadelphia, Penna., appearing for the Pennsylvania Railroad Company.

Mr. Charles R. Webber, B. & O. R. R. Co., Law Department, Baltimore, Md., appearing for The Baltimore & Ohio Railroad Company.

Mr. William L. Kinter, and Mr. William I. Woodcock, Jr., Reading Terminal, Philadelphia, Pa., appearing for the Reading Company.

Mr. M. Hampton Todd, 133 S. 12th Street, Philadelphia, Pa., and Mr. William A. Glasgow, Jr., 1018 Real Estate Trust Building, Philadelphia, Pa., appearing for the Merchants Warehouse Company.

Mr. William A. Glasgow, Jr., 1018 Real Estate Trust Building, Philadelphia, Pa., and Mr. Allen S. Olmsted, 2nd, 2301 Packard Building, Philadelphia, Pa., appearing for The Commercial Exchange and other Trade Bodies, Interveners.

Mr. Winfred N. Stilwell, (for H. Edgar Barnes, Esq.), 518 Real Estate Trust Building, Philadelphia, appearing [fol. 295] for the Pennsylvania Warehousing & Safe Deposit Company.

Mr. John P. Connelly, 1526 Land Title Building, Philadelphia, Pa., appearing for the Philadelphia Warehousing & Cold Storage Co., interveners.

Mr. Hubert J. Horan, 465 Bourse Building, Philadelphia, Pa., appearing for the Commercial Exchange of Philadelphia, Pa.

Mr. Herbert J. Campbell, 105 South La Salle St., Chicago, appearing for Millers National Federation, intervener.

COLLOQUY

Examiner Brown: The complaint in No. 20968 alleges that the rates and charges collected by the defendant for the transportation of commodities from complainant's warehouses in Philadelphia to interstate destinations, or from interstate origin points to said warehouses were and

are unjustly discriminatory, unduly preferential of other competing companies, and unduly prejudicial to complainants, in violation of Sections 2 and 3 of the Interstate Commerce Act. The Commission is asked to prescribe non-discriminatory and non-prejudical rates for the future and to award reparation.

The issues in the sub-numbered complainants are identical except that the parties are, in some instances, different.

Are the issues correctly stated?

Mr. Hickey: I believe they are.

Mr. Kinter: They are correctly stated, but we think the [fol. 296] issue as to No. 20968, Sub No. 2, is necessarily separate and distinct from that in the other cases. This appears from the fact that this is brought as a separate docket, and is based on contracts as to which the Reading Company and certain warehouse companies alone are parties.

We ask for a severance of this Sub No. 2 from the other cases. We believe it will make for clarity of the record, and there will be no difficulty if the main case is heard first, as we presume it will be, in stipulating in the record in Sub 2, parts of the record of the main case as are applicable to our case.

Mr. Webber: On behalf of the Baltimore & Ohio Railroad Company in Sub No. 1, I make a similar request. I think it will, at least, make the record much clearer if we can have the record separate.

Examiner Brown: How about you, Mr. Bikle?

Mr. Bikle: It is a matter of indifference to me, provided it be understood in taking the testimony, that the cases are not consolidated in a legal sense, but simply heard concurrently. In other words, I agree with Mr. Kinter and Mr. Webber, that the three cases are independent legally, but I have no objection either to taking all the testimony at once or to taking it separately, but if it is taken at once, I think it ought to be understood that it is applicable to each case.

Examiner Brown: Mr. Hickey, is your testimony so prepared that it can be presented separately?

[fol. 297] Mr. Hickey: I have not planned on three separate trials in these cases. I have certain witnesses coming today and certain witnesses coming tomorrow, and some more on Wednesday.

For instance, I will call one witness to testify for the Bailey Warehouse, and I have to confine his testimony to the Pennsylvania Railroad alone then after we finish the Pennsylvania Railroad case we will have to put the same witness on and go over virtually the same ground for the Baltimore and Ohio, and when we finish the Baltimore & Ohio case, we will have to put on the same witness for the Reading case, and try it three times over.

But, I want to help Mr. Webber and Mr. Kinter in a separate presentation so far as I can, but I do not think I should be required to try the same case three times over; that is, calling the same witnesses for each case, and if those gentlemen can help me out of that dilemma, I will try to be helpful to them in getting as much of a separate presentation as we can work out.

Mr. Webber: I think it is possible to agree that testimony of a general witness so far as it relates to the practices that are under consideration here may be made a part of the record without repetition of the actual testimony in each of the sub-numbers.

Examiner Brown: Mr. Webber, do you feel that a consolidated hearing will prejudice your case?

Mr. Webber: Well, sir, I cannot tell. My thought is this, however; that we will have a much clearer record, and we [fol. 298] may have different facts in the sub-numbers from the facts in the original case, and therefore it will be a help to the Commission as well as ourselves, in writing our briefs, if we can have the testimony separated as to each of the cases, so far as it may be possible, the testimony having a general bearing upon all of the issues.

Mr. Hickey: You appreciate I am in quite a dilemma in trying to separate the testimony of my witnesses——

Mr. Webber: Certainly. Your witnesses, I understand, will testify in the first place with respect to his business, and he wants to speak, first of all, with regard to the original complaint——

Examiner Brown: Further discussion on this subject will be off the record.

(A short informal discussion, off the record, followed; after which the hearing was resumed as follows:)

Examiner Brown: The ruling of the Examiner is that this case shall be tried at the same time.

In so far as possible, Mr. Hickey has agreed off the record, to present these cases in such a manner so that they can be distinguished between the original complaint and the two sub-numbers. The defendants, as I understand it, have prepared their cases separately and their presentation will follow exactly the complaints in which they are interested.

This record will be a consolidated record and all testimony taken in this case will apply equally to all three complaints, in so far as they are specifically applicable to these complaints.

[fol. 299] Mr. Hickey: I would like to have it understood that I cannot undertake to separate the testimony of certain representatives of the complainants who deal with the three Railroad Companies; that it will be impossible for me to separate that testimony.

Examiner Brown: You may proceed, Mr. Hickey.

Mr. Hickey: If the Examiner please on July 17 I filed an application with the Commission for the issuance of a subpœna duces tecum which, if issued, would require the Pennsylvania Railroad Company to produce certain of its records and documents pertaining to the issues in this case. A few days afterwards the Chief Examiner asked me to submit a letter to counsel for the Pennsylvania Railroad Company asking him to produce these records. I might say the same course of action was taken with respect to the Reading Company and the Baltimore & Ohio.

So, at the suggestion of the Chief Examiner, I sent a letter to Mr. Bikle, counsel for the Pennsylvania Railroad, and I will now ask Mr. Bikle to produce the records called for in that letter, or to state the position of the Pennsylvania Railroad Company in the matter.

Examiner Brown: You have made a similar request on the Baltimore & Ohio and the Reading Company?

Mr. Hickey: Yes.

Examiner Brown: Mr. Bikle?

Mr. Bikle: I wrote Mr. Hickey that my Company would produce these documents forthwith to the extent it would be practicable, but I find we can produce all of them.

I think it is perfectly permissible for the railroad, either of its own volition or at the request of its adversary, to produce relevant matter from its records for presentation to the Commission.

[fol. 300] Examiner Brown: Mr. Webber, have you similar information?

Mr. Webber: Yes, I received Mr. Hickey's two letters, which I think were sent on the same date, requesting copies of agreements and certain information as to shipments. I am prepared to introduce such parts of the agreement as are relevant to this proceeding and also to furnish the information regarding shipments.

Mr. Kinter: We are prepared to produce substantially all the records that Mr. Hickey has called for. We do this in the belief, as stated by Mr. Bikle, that it is proper to produce this evidence, and we believe practically we are under the compulsion of a subpœna because if we did not comply with the request the subpœna would issue.

Mr. Hickey: I now call for the production of the agreements in writing and leases between the Pennsylvania Railroad Company and its subsidiaries on the one hand and the Merchants Warehouse Company on the other hand, that were in force at any time during the past five years.

Mr. Bikle: I have those, Mr. Hickey, but these are photostat copies. I have no objection to their going into the record entirely and completely, but I should have objection to portions of them being put in. The letters to which you refer, Mr. Hickey, are letters which, to some extent, modify the formal contract, and the formal contract would not [fol. 301] have been complete or a true exhibit without the attached letters.

Mr. Hickey: With that explanation, I will proceed to put them in now.

Examiner Brown: This exhibit will be marked complainants' exhibit No. 1, for identification.

Snowden Henry was there upon called as a witness for the complainant and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

My name is Snowden Henry. I am employed in the service of the Merchants Warehouse Company as superin-

tendent and have been employed as such superintendent for approximately three years. My duties in that position are more or less a little bit of everything; assistant to Mr. [fol. 302] Richardson in various capacities; soliciting freight; handling various warehouse shipments, and whatever I am told to do, more or less.

The Merchants Warehouse Company handles packing freight principally of a very wide range—nearly everything—practically all package freight, not of an inflammable or explosive character—virtually all such package freight specified in the consolidated freight classification. The Merchants Warehouse Company is engaged in storage business at Philadelphia. It operates approximately 12 warehouses. The location of each of these warehouses is:

The River Front Store; No. 10 Chestnut Street; going down Delaware Avenue we have a warehouse known as Front and Kenilworth; Front and Bainbridge; Franklin Stores; Front and Federal Street Warehouse; 15th and Carpenter Street Warehouse; 31st and Chestnut Street Warehouse; Kensington, at Front and Berks Street, and Shackamaxon warehouse, on North Delaware Avenue, at No. 1055 and 1057.

Each of these warehouses is served by side track connections with the Pennsylvania Railroad Company. Freight is shipped inbound to these warehouses over the Pennsylvania Railroad, the quantity depending on the size of the warehouse; the small warehouses get a small amount and the larger warehouses get considerable. Freight is also shipped outbound over the Pennsylvania Railroad. We get materials from pretty nearly every state in the United States; and it goes out that way—we ship all over the country. At some time in each year some of the outbound shipments probably go to every State in the United States. I do not know how many inbound carloads of freight over the [fol. 303] Pennsylvania Railroad are received by the Merchants Warehouses in any recent month or year.

Mr. Richardson, the General Manager and Treasurer, participated in making claims or bills for the allowance claimed by the Merchants Warehouse Company.

Q. Mr. Henry, I show you an advertisement purporting to be published at page 161 of the Traffic World of January

21, 1928, and I will ask you if you find the advertisement of the Merchants Warehouse Company there, and if you know whether that was inserted in due course of business by the Merchants Warehouse Company?

A. To the best of my knowledge it was; yes, sir.

Mr. Hickey: I offer that in evidence.

Examiner Brown: This will be marked No. 2 for identification.

(The exhibit referred to was thereupon marked for identification "Complainants' Exhibit 2, Witness Henry.")

By Mr. Hickey:

Q. I show you what purports to be a trade publication, Commerce and Industry, issue of January, 1927, and call your attention to page 3 of the publication and ask you if you recognize that as an advertisement of the Merchants Warehouse Company, put out in due course of business?

A. Yes, sir.

Mr. Hickey: We offer that advertisement in evidence.

Examiner Brown: That will be No. 3 for identification.

(The exhibit referred to was thereupon marked for identification "Complainants' Exhibit 3, Witness Henry.")

[fol. 304] By Mr. Hickey:

Q. I show you what purports to be a pamphlet, entitled "American Chain of Warehouses, Incorporated" and ask you if you find the Merchants Warehouse Company listed in that pamphlet?

A. Yes, sir.

Mr. Hickey: We offer that in evidence.

Examiner Brown: No. 4, for identification?

(The pamphlet referred to was thereupon marked for identification, "Complainants' Exhibit 4, Witness Henry.")

By Mr. Hickey:

Q. Mr. Henry, I show you what purports to be a list of names of concerns, point of shipment, and commodity, and I will ask you if these concerns are patrons of the Merchants Warehouse Company?

A. Most of them are or have been; most of them are.

Q. Now, look over the list and point out which of them are not and have not been.

The Witness: I do not recognize the Certain-Teed Products Company.

Mr. Hickey: I offer that list in evidence with the exception of the Certain-Teed Products Company.

[fol. 305] (The exhibit referred to was thereupon marked for identification "Complainants' Exhibit 5, Witness Henry.")

By Mr. Hickey:

Q. Mr. Henry, look at Exhibit 5, the name of the Morton Salt Company. Will you describe the services performed by the Merchants Warehouse Company on shipments of goods consigned to the Merchants Warehouse Company by the Morton Salt Company?

A. In most cases the Morton Salt Company ship a car to Philadelphia to the warehouse; the car is consigned in our care. When that car gets to Philadelphia their Philadelphia representative issues orders on the car and various customers will come and take delivery of the car within 48 hours after its arrival at the warehouse.

What is left over will be put in storage. In this particular instance practically all of the goods go out in the free time. The car is consigned to the Morton Salt Company and their representative will give orders for delivery to the various customers. When those customers present their orders to the Merchants Warehouse, we honor those orders by distribution of the salt in whatever lots these orders call for. I am not sure about this particular one, but in most cases it is a signed order. That salt is shipped in car loads at car load rates. Practically the same service is performed by the Merchants Warehouse Company for the Worcester Salt Company.

The Vacuum Oil Company are tenants in one of our [fol. 306] buildings, and most of their shipments come in and are unloaded and placed in their section.

The Merchants Warehouse Company performs unloading service. It claims a stipulated allowance on each ton of the freight unloaded for the Vacuum Oil Company.

Examiner Brown: To what stipulated allowance have you reference?

The Witness: The warehouse, as I understand, has certain contracts with the Railroad; and these Vacuum Oil Company cars would get an allowance under that contract, to the best of my understanding.

The service which the Merchants Warehouse Company performs for the Williamsport Wire Rope Company is that they unload their rolls of wire and place that wire up in their section; they are tenants of the Warehouse located at Front and Kenilworth Streets. The Merchants Warehouse Company claims an allowance for that unloading service. The service the Merchants Warehouse Company performs for the Rossville Company is the same character of service as I described for the Williamsport Wire Rope Company.

The service the Merchants Warehouse Company performs for the Sterling Products Company is the same service—unloading and placing in their section. The Sterling Products Company is also a tenant occupying space in our warehouse.

The service the Merchants Warehouse Company performs for the Fort Pitt Bedding Company I do not know much about; that is handled at Federal Street, but I think we do the same thing. I think we unload their cars, [fol. 307] although I think we have only unloaded a few cars for them. By the same thing, I mean distribution service—distribution of car loads in 1. c. 1. lots. I am sure they have had car loads in, although I would not want to testify as to that.

The service the Merchants Warehouse Company performs for the Cudahy Packing Company is unloading car loads and distributing their packages in 1. c. 1. lots.

We handle very few cars for the O'Sullivan Rubber Company, but I think it is practically the same as for the Fort Pitt Bedding Company. They are tenants and this is handled in connection with another company. The O'Sullivan Rubber Company have space there in joint account with somebody else in the warehouse. I do not think their goods are received in car loads; I think they come in 1. c. 1.

John B. Astell & Company rents space in the West Philadelphia Warehouse, and their cars are unloaded and de-

livered in their space. In some cases the cars are delivered in the free time. The service performed for the Climalene Company is more or less the same thing; I mean the cars are unloaded and shipments delivered within 48 hours, most of the time, I think, in that case. I think that company is not a tenant of the Merchants Warehouse Company. I think they have a representative here. The service is distribution service that is performed for that company.

The service we perform for the Campbell Soup Company is to store their products and distribute them. They come to the warehouse in car loads at car load rates and we afford the storage service or the distribution service.

[fol. 308] The Richardson & Boynton Company are tenants in the warehouse and their cars are unloaded and put in their section.

Summarizing Exhibit No. 5 as to the remaining customers they are practically all handled in the same way. Either they are tenants in possession of leased space from the Merchants Warehouse Company or else they are customers and their goods come in in car loads and we distribute them in 1. c. l. lots; we distribute the material the same as a freight station, coming within the 48 hours free time; exactly in the same capacity as a railroad freight station, as an agent of the carriers'. I know how a freight station distributes car load freight. I think that any freight station in Philadelphia does distribute car load freight—transport it at car load rates in l. c. l. lots to more than one consignee—that is my understanding. I do not know of my own knowledge that I can substantiate. I can not specify the published railroad tariff authorizing that distribution of car load freight at the railroad freight stations which I have in mind.

The source of my information that any railroad freight station in Philadelphia distributes car load freight in l. c. l. lots to several parties is that I have heard various customers say they could make shipments to these freight stations and distribute the cars out of the freight station the same as they could in the warehouse. One of these customers is the walnut people that ship walnuts. I do not know what they said; that has been two years ago. I do not know the name of the person I talked with. I can not repeat what was said in that conversation. I am not in a posi-

tion to specify any published tariff providing for that patronage.

[fol. 309] Taking up the distribution of these inbound car loads of freight at car load rates—the distribution of the contents to several customers—to the best of my bnowledge—now, I do not handle those orders so I cannot swear to this—but these orders come to us from the consignee who ships the car to the warehouse——

Q. You said the consignee who shipped the goods to the warehouse; did you mean the consignor?

A. In most cases the car is shipped to the consignee in Philadelphia, who may be a representative of the consignor; but the car comes consigned to the consignee at the warehouse.

Q. At the warehouse or in care of the warehouse?

A. John Smith in care of Merchants Warehouse Company.

Q. Well, Mr. Henry, do you know the various officers of the Merchants Warehouse Company?

A. Yes, sir.

Q. You are able to identify their signatures?

A. I think so.

Q. And the signatures of the clerks and office force?

A. I am not sure about all of that; I know them but I cannot promise you specifically.

Q. I show you what purports to be a letter of April 30, 1928, from Mr. George M. Richardson, addressed to the Bethlehem Wood Products Company, and ask you if you can identify that as a letter sent out by Mr. Richardson?

A. That is not Mr. Richardson's signature, but the letter was sent from his office.

[fol. 310] Q. Do you know the signature of his principal or chief clerk, or the others?

Examiner Brown: The witness testified that was sent from Mr. Richardson's office.

Mr. Hickey: I offer that letter.

Mr. Glasgow: As to these letters—they were issued from Mr. Richardson's office. Some were signed by him and some not, but we assume he assumes the responsibility for them.

Mr. Hickey: I offer the letters in evidence and will identify them.

That is Exhibit No. 6, Mr. Examiner.

Examiner Brown: Exhibit 6.

Mr. Hickey: I offer in evidence the several letters which Mr. Glasgow stated had been sent from Mr. Richardson's office, and I identify them as follows:

A letter from Mr. Richardson to the Chicago Jewelers Tool Works, under date of June 16, 1928.

A letter from Mr. Godley addressed to the Alcazar Range & Heater Company under date of June 20, 1928.

A letter from Mr. Godley addressed to George Steers & Sons, under date of June 22, 1928.

A letter from Mr. Godley, addressed to Mr. Calvin E. Alhum, under date of May 17, 1928.

A letter from Mr. Richardson addressed to Kurtz [fol. 311] Brothers Incorporated, under date of May 4, 1928.

A letter from Mr. Richardson, addressed to the Bethlehem Wood Products Company, under date of April 30, 1928.

A letter from Mr. Godley addressed to the Hunter Van and Motor Company, under date of May 18, 1928.

Examiner Brown: Those letters will be marked for identification Exhibit No. 6, consisting of 7 sheets.

(The letters referred to were thereupon marked for identification "Complainants' Exhibit 6, Witness Henry.")

By Mr. Hickey:

Q. Mr. Henry, look at this letter of June 6, 1928, from Mr. Richardson, addressed to the Chicago Jewelers Tool Works and to that part which I will read for you:

"* * * Therefore any portion of your car load shipments delivered within the free period would be handled by us without expense to you."

Now, will you describe in detail the services performed within that free period that would be performed by the Merchants Warehouse Company in making that distribution within 48 hours, starting with the arrival of the car if you will, please?

A. Well, the car would be unloaded and the consignee would be notified that the car was ready for delivery, and

whatever portion of that car was taken within the 48 hours would not be charged storage, and at the end of 48 hours the car would be placed in storage. The first 48 hours [fol. 312] would be free the same as the Railroad would have.

Q. Then, if you distributed the contents of that car load to two persons, five persons, ten persons, or twenty persons, if all that distribution was accomplished within 48 hours the Merchants Warehouse Company would collect no charges from the owners of the goods?

A. That is correct.

Q. In accomplishing that distribution necessarily the Merchants Warehouse Company had to pay the wages of its employees who transferred the freight from the railroad cars and delivered it to those various parties, that is, put it on their trucks.

When the inbound cars arrive the Merchants Warehouse Company transfers the freight of the tenants from the cars to the space rented by the tenant and after that the tenants do whatever they wish with the goods. I am not familiar with the use of leased space made by the Sherwin Williams Company, except that they are tenants in the River Front Stores.

The solicitors of trade employed by the Merchants Warehouse Company are:

Mr. Richardson solicits, I solicit—all of us connected with the company solicit; that is our business—we try to get all the business we can.

The Merchants Warehouse Company does not operate a trucking service of its own to my knowledge. We have several trucking concerns who truck for the Merchants Warehouse Company, the Philadelphia local express, Merchants Parcel Delivery, and various other companies. We do [fol. 313] business with most trucking companies in Philadelphia.

Examiner Brown: Without objection complainants' exhibits 1 to 6 will be received in evidence.

Cross-examination.

By Mr. Glasgow:

I am the superintendent of the Merchants Warehouse Company and have been acting in that capacity for the

last three years. I have general supervision over the handling of its business, of the Merchants Warehouse Company, and when I say handling of its business I mean its physical business or handling of traffic at its warehouses. When freight comes in the warehouse, it is consigned to the owner of the freight or his representative in Philadelphia and for the purpose of delivery it is put on the bill in care of the Merchants Warehouse Company at some designated point where it has a warehouse. That is done for the purpose of enabling the consignee to receive his freight at the most convenient point for delivery in the City of Philadelphia. We have warehouses all over the city, practically. The business is handled in this way, so as to permit the consignee to get the delivery of his freight at the nearest point.

Mr. Hickey: If the Examiner, please, I object to the use of the word "consignee" when the billing is not before us.

When a car load shipment comes in of package freight, the consignee of that freight pays the freight charges and he pays that to the Railroad Company or the agent of the Railroad Company and that entitles him to the delivery of his freight without any additional charge to the freight rate. Sometimes in sporadic cases we collect the freight for the Railroad Company.

[fol. 314] Mr. Hickey: If the Examiner please, if we are to continue all this line, you see a lot of testimony is being built up on the supposition that there is a consignee of these shipments other than the Warehouse Company.

Mr. Glasgow: There is——

Mr. Hickey: And yet, if we get down to the billing there may be, in fact, no such consignee, and my opponent is simply building up a structure here without, as I see it, any foundation for it. He described the inbound carload shipments of freight and how it was distributed by the Warehouse Company. Of course in that case the Railroad Company has only a car load dealing. Now, surely, none of these parties in Philadelphia to whom a carload of freight was distributed in small lots would be glorified in being designated the consignee of a carload shipment. So, I say to you, we cannot get accurate information as to who is the actual consignee of the shipment until we have the billing before us.

Examiner Brown: It is proper to develop the exact facts in this connection. The ruling of the Examiner is that the cross-examination is proper and Mr. Glasgow may continue to cross-examine along any of these lines, but I will instruct the witness that he must testify as to matters within his own knowledge, and testify as to facts only. If Mr. Hickey disagrees with the facts as brought out by the cross-examination it will be within his province either [fol. 315] under the heading of redirect examination or other evidence to prove that such evidence is not in accordance with the complainants' understanding.

Mr. Bikle: May I add this: At Mr. Hickey's request we are going to produce copies of the billing for that period, and they will operate as a check on any verbal testimony. From my point of view I would be just as unwilling as Mr. Hickey is from his point to yield the effect of these written documents to oral testimony.

The Witness: The shipments come in consigned to the owner or to the owner's representative at Philadelphia [fol. 316] in care of the Merchants Warehouse Company. It is my understanding that upon the payment of the freight bill the consignee is entitled under the tariffs to the delivery of the freight to him or such person as he may designate. Then in the delivery which is made of the cars brought into the platform of the Warehouse Company, it is unloaded by the Warehouse Company. It is then separated in accordance with directions to the Warehouse Company, either contained in the bill or from the consignee, as to how it will be separated for delivery and then the delivery is made, if required, in the free time of 48 hours to such persons as the consignee of the freight directs us to deliver it. After the expiration of 48 hours, if there is any in that car load that has not been delivered on the order of the consignee, that is carried by us or our company in its storage warehouse, and thereafter storage is charged against the owner or consignee of these goods.

It is my understanding that our company for its services of receiving this car load of freight, unloading, and doing whatever is necessary to make the delivery of the freight, is paid a certain sum, and that that sum is provided for under contract that we have with the Railroad Company. For the services which we perform in making this delivery, we are paid by the Pennsylvania Railroad.

The consignee or his representative pays to the Railroad Company, or, in some instances, to the Warehouse Company for the Railroad Company, the charges for freight and deliveries that are made against him by the Railroad Company. The service which we perform while paid to [fol. 317] us by the Railroad is, in fact, paid by the consignee or his representative to the Railroad Company in the tariff—in the rate of charges against him. The Warehouse Company does not make any shipment of freight itself—not in the name of the Warehouse Company; they ship for the consignee. The consignee delivers it to the Warehouse Company for shipment, or they give orders on their freight in the warehouse, to be shipped for them, that is, where it is in the warehouse in storage. None of the freight that is coming in, shipped to the warehouse company is consigned to the warehouse company to my knowledge.

By Mr. Glasgow:

Q. Now, Mr. Henry, I noticed in reply to one question of Mr. Hickey's you referred to a certain traffic saying that it was shipped so and so. You were referring to traffic that had already been stored in your warehouse, or to traffic that was delivered to the Warehouse Company for immediate shipment?

A. The Warehouse Company does not own any freight; they ship on people's orders. If we ship it it would be only on receipt of an order from the man who owns the freight, to do so.

Q. When you speak of shipping it out you mean shipping it out from your warehouse for somebody's account?

A. If we make any shipment from the warehouse it would be for somebody's account.

Q. The freight to which you referred was freight on storage in your warehouse?

A. Yes, sir.

[fol. 318] Q. And on the order of the owner you delivered it to the Railroad Company for transportation?

A. Yes, sir.

Examiner Brown: What party is shown as the consignor in the bill of lading in connection with a shipment of that character?

A. In a shipment of that character, it would be stored in the warehouse in some one's name. That person would send an order to the Warehouse Company to have it shipped out.

Examiner Brown: But what party would appear on the bill of lading as the consignor of the shipment?

A. The person who owned the shipment would be shown as the shipper.

Examiner Brown: And the Merchants Warehouse Company would not appear as the consignor in the shipment?

A. No, sir.

By Mr. Glasgow:

Q. Now, when you referred to this Morton Salt Company, I noticed that you referred to the salt "consigned to us"——

A. Consigned to the Merchants Warehouse Company.

Q. In your care?

A. Yes, sir.

Q. Not consigned to the Merchants Warehouse Company then?

A. No, sir.

By Mr. Bikle:

Q. In your Exhibit No. 5 there are sundry instances in which the point of shipment is in Pennsylvania. It is true, is it not, that a number of your patrons are Pennsylvania [fol. 319] firms and industries?

A. Yes, sir.

Redirect examination.

By Mr. Hickey:

Q. Was your answer to Mr. Glasgow that the Merchants Warehouse Company was not the consignee of these shipments, based on the circumstance that the Merchants Warehouse Company did not own the goods?

A. Yes, sir.

Q. The Merchants Warehouse Company actually received those inbound goods and accepted delivery from the Pennsylvania Railroad, did it?

A. Yes, sir; acting as agent of the Railroad they received that.

Recross-examination.

By Mr. Glasgow:

Q. You say that your statement that the Merchants Warehouse Company was not the consignee of the freight was based upon the fact that the Merchants Warehouse Company did not own the commodity; isn't it also based on the fact that the bills that come in show on the face to whom it is consigned?

A. Yes, sir.

Q. And as I understand you, those bills, as far as your knowledge goes, run to the real owner or his representative as consignee in care of the Merchants Warehouse Company?

A. That is correct; certainly.

F. J. Fell, Jr., was thereupon called as a witness on [fol. 320] behalf of the complainant and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

I am Comptroller of the Pennsylvania Railroad Company.

Q. Have you produced certain bills or claims, relating to allowances made by the Pennsylvania Railroad Company to the Merchants Warehouse Company?

A. Those are the claims or the bills (producing same).

Q. Is a separate claim presented by each of these several warehouses operated by the Merchants Warehouse Company, or is one claim presented for each of the warehouses?

A. Each one shows a separate claim.

Q. Mr. Fell, I show you a bill under date of May 29, 1926, of the Merchants Warehouse Company to the Pennsylvania Railroad Company, evidently offered in support of the monthly claim which you have just handed to me, which seems to be identified by No. 267,276, and I will ask you to read from that bill the description of the allowance claimed by the Merchants Warehouse Company?

A. (Reading:) "To Terminal Charges on Cars as follows, for the month of May, 1926." It is a printed form.

The form is the same in the month of June as it is in the month of May. The claim for January 1, 1927, is the same form of bill, (producing same) and the same language on the bill. The latest bill or claim that I have before me is May, 1928, and also reads, "To terminal charges on cars as follows."

Mr. Hickey: I would like to ask counsel for the Merchants [fol. 321] Warehouse Company is there some way that I can get in this record in a short time an indication of the annual amount of the allowance claimed?

Mr. Glasgow: I have no objection to admitting that the cars that passed through the terminal of the Pennsylvania Railroad and this warehouse under the contract with the Pennsylvania Railroad Company are substantial in number; and that the revenue from it is substantial.

By Mr. Hickey:

Q. Mr. Fell, did you produce the vouchers in connection with those claims?

A. I did.

Q. Is it your understanding that no part of these allowances were apportioned to connecting lines?

A. None that I see on the few bills I have examined.

Q. Will you look at the bill for the month of May, 1926, and then look at the bill for the month of May, 1928, and see if that fact is established by each of these two bills?

A. May, 1926, so far as I can tell from this voucher, it was borne by the Pennsylvania Railroad.

Mr. Hickey: Mr. Bikle, would it be consistent to not take up time here and have a stipulation that the claims and the checks produced by Mr. Fell reflect payment of the allowances at the rates specified in the contracts and agreements Exhibit No. 1 and in Pennsylvania Railroad Tariff G. O. I. C. C. 14400?

Mr. Bikle: I can say, Mr. Hickey, that that is the inten- [fol. 322] tion. I mean if there is any failure to do it it is an error. We think they do, sir.

Mr. Hickey: Is there any objection to that, Mr. Glasgow, that we proceed on the theory that they do?

Mr. Glasgow: None in the world.

Mr. Hickey: Then I offer in evidence the statement of the allowances, which is reproduced from Pennsylvania Rail-

road tariff G. O. I. C. C. No. 14400. This reflects both allowances to the Merchants Warehouse Company and to the Quaker City Cold Storage Company.

Mr. Bikle: We will check that, Mr. Examiner, and if we have any different understanding we will let you know, sir.

Mr. Hickey: That is agreeable.

Examiner Brown: Without objection it will be received as complainant's Exhibit No. 7.

(The document referred to was received in evidence, marked "Complainant's Exhibit No. 7, witness Fell," and the same is forwarded herewith.)

Mr. Hickey: May I also have a stipulation or agreement that these claims and checks show payment of allowances by the Pennsylvania Railroad Company to the Quaker City Cold Storage Company at the rates specified in Pennsylvania Railroad tariff G. O. I. C. C. 14400?

Mr. Bikle: That is what we understand they do, Mr. Hickey. I mean we have not rechecked all of these, but that was the intention.

[fol. 323] Mr. Glasgow: I understand Mr. Bikle's qualification is only to cover clerical error. The account, the amount of it, is intended to be in accordance with the contract and the tariff, and if it is different it is a clerical error.

Mr. Bikle: That is what I mean.

Mr. Hickey: That is sufficient.

Mr. Bikle: Just as in the other case.

The Witness: The claim of the Merchants Warehouse Company for the month of May, 1926—the aggregate of the claim paid for that month was $10,485.09—May, 1927, was $9,615.59, for every one of the warehouses for which the claim is rendered. October, 1927, was $18,695.66.

Cross-examination.

By Mr. Bikle:

These payments were charged to operating expenses; where payments are made by the company on account of allowances to shippers for service rendered by them in connection with their own shipments, such charges are charged to Account 101, freight revenue, that is, deductions from revenue, so that in the accounting for these pay-

ments there is a fundamentally different method pursued than in the accounting for payments of allowances to shippers who perform service on their own shipments. It is the function of my department to audit these bills. The basis of these payments is the contract.

BENJAMIN ABBOTT DICKSON was thereupon called as a witness on behalf of the complainant and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

I am employed in the service of Mr. Walter A. Bailey, a complainant in this case. Mr. Bailey is engaged in the [fol. 324] warehouse business under the name and style of Walter A. Bailey trading as Bailey Warehouses. Mr. Bailey has operated warehouses in Philadelphia approximately 10 years. Our general offices are located at 620 South Delaware Avenue. We operate two locations of warehouses; one bounded by Delaware Avenue, South, Swanson and Bainbridge Streets, and the other bounded by Delaware Avenue, Tasker, Water and Morris Streets. The value of our warehouse facilities is about $2,365,000. Our business consists in inducing or soliciting people to ship carloads of merchandise in to us, and our customers can be classified in this way:

Out of town manufacturers who ship carloads into Philadelphia for distribution by us; brokers and sales agents who have offices in Philadelphia, who receive merchandise by carloads, which we receive and distribute for them; also there are local manufacturers who receive raw materials, which we handle for them until they are ready to use it. That carload freight is transported at carload rates. The outbound freight is a considerable portion of our business. We load cars and ship for local manufacturers or manufacturers out of town or for sales agents or brokers. Those people in Philadelphia patronize our warehouse instead of receiving their own inbound freight and shipping their own outbound freight because we have the facilities for handling them. To ship or receive cars you have got to

have carload sidings, platform sites, sites to warehouse and store. Also you have to be equipped to load various kinds of package freight and sometimes bulk material. A great many of these people in Philadelphia do not have such equipment. Some of them have not even offices, let alone warehouses.

[fol. 325] We have some Philadelphia customers who have their office in their hat. That is, they will have a home address, or they may have in Philadelphia their own home out in some remote suburb. Naturally, for a customer of that kind we have to take care of receiving all his freight and do all the shipping for him, because he has neither the facilities nor labor forces nor has he the information to do it.

Those who have offices there are also not equipped to ship, and we receive and ship for them. That is, they have office space. They may have just desk space, or a suite of offices, but no siding, no warehouse and no facilities for handling or distributing a whole car or parts of a car, and so they come to us and ask us to receive and ship for them. Their orders come to us by United States mail or by telephone confirmed by U. S. mail or messenger.

I am thinking now of a customer who receives carload lots, who rents his desk in somebody else's office in the Central Office Building in Philadelphia. I would say he was half a mile from carload sidings and has only desk space. These customers in Philadelphia are sometimes sales agents or brokers and they will receive orders for various kinds of merchandise and they will draw on us to take care of filling these orders or distributing those cars, or they will have cars shipped into Philadelphia for us and we will distribute for them. Such a sales agent may have half a dozen different lines, or may represent one firm or have half a dozen different lines. He may represent five or ten or twenty different manufacturers in different parts of the country. He just conducts a general sales business in Philadelphia and has office space there, sometimes not even [fol. 326] that. We have customers who have no offices and in some cases even no representatives in Philadelphia, and they will ship carload merchandise to us at carload rates, and we will unload the cars, ship, it might be, five and it might be six l. c. l. lots, or distribute in the City of Philadelphia, five or six or a dozen lots out of that car. In that case we do everything for him, even collect charges on the

merchandise, pay the freight. We will even pay the demurrage and we will even collect for his merchandise, plus storage and handling charges, plus freight prorated per package. Sometimes we collect the invoice prices. His distribution of inbound carload freight was in l. c. l. lots. That comes to us in carload lots at carload rates. We may reship l. c. l. lots, or we may distribute five, ten or twenty smaller lots, distribute them in the city of Philadelphia and its environs, or distribute a series of l. c. l. shipments.

We have customers all over the United States and some abroad that do this inbound shipping in Philadelphia which I describe. They are very largely manufacturers or wholesalers. Generally they will be wholesalers, manufacturers, and also commodity brokers for raw material commodities. There are a large number of well known concerns that use merchandise warehouse distribution of carload freight in the manner that I have described. There are hundreds of nationally known concerns that do that. They use that distribution service not only in Philadelphia but in the other prominent cities.

Through the Bailey warehouses we handle and are equipped to handle all kinds of package freight listed in the official classification except certain items which we are not [fol. 327] allowed by rule of the Philadelphia Board of Underwriters to take. That excludes hazardous explosives, stuff that is fire hazardous, and even household furniture second-hand. Our warehouses are served by private sidetracks connecting with the Pennsylvania Railroad, the Baltimore & Ohio Railroad, and the Reading Company. This freight comes to us over all those three railroads, into our warehouses, and we will ship out over all those three railroads out of our warehouses. As to how we get this warehouse business, we solicit it. We advertise for it. We send out direct mail letters. We use every legitimate means of attracting business. As I say, mainly the three methods, solicitation, advertising, and direct mail.

We are here complaining about the allowances made by the Pennsylvania Railroad to the Merchants Warehouse Company, the Quaker City Cold Storage Company, and allowances made by the Reading Company to the Pennsylvania Warehouse and Safe Deposit Company and the Philadelphia Warehousing & Cold Storage.

The Baltimore & Ohio also make allowances to the Pennsylvania Warehouse & Safe Deposit Company.

Mr. Bailey operates what is commonly called a merchandise warehouse business—public warehouse business. This Quaker City Cold Storage Company operates what is known as a cold storage warehouse business. Nevertheless, we have complained and we do complain of allowances given to this Cold Storage Warehouse concern resulting in a [fol. 328] discrimination against the business of Mr. Bailey because there are several commodities which we can take in the colder months of the year and even something in the warm months of the year which we can take and which they also go after, and that discrimination operates against us in the solicitation of those commodities.

Our business is competitive with that of the Cold Storage Warehouse Company. There are certain commodities like minetta, bulbs, figs, dates, milk products. The other warehouse companies that receive these allowances compete with us in the solicitation and handling of warehouse business. The allowances have been used against us in that competition. They are used against us every day that we are soliciting competition. It works out this way: Take the example of the flour, the storage rate in effect on flour now is 9 cents a barrel, with no labor charge. That rate was established by the subsidized warehouses. Warehouses like the Bailey warehouses, who receive no pay from the railroads for unloading cars cannot afford to unload carload lots of flour and then receive no labor charge for that service from the customer. As a result of that, we have given up the solicitation of the flour business. If we get it we would lose money. In other fields it works out the same way. The labor charge which people can afford to unload stuff for scales from the regular charge down to zero, whereas we have to have a labor charge which somewhat approximates our cost of handling in order to take the business. The storage rate is about equal, with no labor charge, or being able to give away free labor charge they can lick us in [fol. 329] direct solicitation by that advantage. I will give you two examples just how this labor charge prevents us from getting the business and just how this free labor charge that I refer to enables our subsidized competitors to get the business. One is a case where we meet the busi-

ness, but due to the competition of the subsidized warehouses we were obliged to take it and seriously cut our regular rates. I am thinking of a Chicago furniture concern, who are not a customer of ours, and we unloaded their cars for nothing, merely to meet the competition of the subsidized warehouses at the time when they were making their Philadelphia warehouse connections. All we got from that concern is the storage that is paid for the use of space, but we give them the labor of unloading their cars free.

In another case where we lost the business, the commodity happened to be cement, and it happened to be 100 pound bags of cement. I signed in with a rate of 3 cents for labor and 2 cents for storage, and the man laughed at me. He said he could get his cement stored without any labor charge whatsoever. I tried to equalize by insurance, or by persuading him that our service would be equal or better. It was a question of dollars and cents with him, and I lost the business.

This labor charge is referred to in Exhibit No. 6—the letter to the Alcazar Range & Heater Company, dated June 20th. There is a handling rate here of 25 cents per stove, and a storage rate of $1.

The letter from Mr. Godley to Mr. Steere, under date of June 22, 1928, contains the following reference to the free labor service in that letter. "There would be no charge on orders filed with us before the car is unloaded, and hauled by your customers within 48 hours after the arrival of the [fol. 330] car. If not hauled within that 48 hours the regular storage and labor rates would apply."

I will state the several costs incident to the putting of this freight through warehouses in Philadelphia, and bring out that labor item so we will know just what it means.

We trade with Chicago. I will tell what all the charges are from Chicago until it is distributed: A carload of merchandise starts from Chicago, either prepaid or collect. It rolls into the yards in Philadelphia. The yard will call the warehouse—the yard in our case will call us up and say "We have got a car consigned to you." The car is switched to the siding and the seals are broken and the car is unloaded.

The second item is placing, labor, taking the merchandise out of the car, putting it on the platform and checking the car.

This proposition means that because they are paid to unload cars a man can ship a car into them, and if he removes the whole car within 48 hours it will not cost him a cent. It will cost him the freight rate—the carload rate. And then he can take it out in one lot or five lots or six lots, as he pleases, and if he gets it out within 48 hours there will be no charge for that car. That is, for handling charge through the Merchants Warehousing Company over the Pennsylvania, no charge in addition to the freight charge—no labor charge—no labor charge for distribution of that carload in l. c. l. quantities. He can take it out in as many lots as he pleases, provided he gets it out within 48 hours.

If the Bailey Warehouses sought that business in direct competition with the Merchants Warehouses we would either have to make them the same proposition to meet the [fol. 331] competition, or give up hope of the business. If we made the same proposition, that would mean we would unload the car, and as much as they would unload in 48 hours would give us no revenue, or it would mean that we would donate free labor. We would have to work for nothing—we would give free labor on as much of the car as is taken out in 48 hours. That would involve the use of warehouse structures, equipment, cost of maintenance, and repairs of the buildings, equipment taxes and also wages of the laborers used in transferring that freight from the car at Philadelphia and distributing it in small lots to the various parties it went to and we would get nothing—not a cent—no compensation whatsoever for the service. As to whether we would leave these commodities in the cars for 48 hours or remove them to our warehouse, in order to make deliveries in several small lots they must necessarily be removed from the car and assorted, in some cases. We would perform that labor ourselves. If we had it we would take it all out of the car and put it on our platform, in some cases—it depends on what the commodity is.

My point is, if it were an ordinary commodity where one box was a- good as another that we might have a truck go up and take part of the car and draw ten cases for Tom Jones and ten cases for Bill Smith, but if it were an especial

makeup of boxes in the car for individuals we would have to unload the car and spread it out on the platform and then make the deliveries individually. As a matter of fact, we would probably in all cases unload the cars to get the cars out and clear our tracks so that we would have to perform the labor of unloading the car.

[fol. 332] By Mr. Hickey:

Q. Do you know of any instance where through the offer of that free distribution service the subsidized warehouse companies have taken certain business away from the Bailey Warehouses?

A. Yes, sir.

Q. You can state the name, if necessary, can you?

A. Yes, sir.

[fol. 333] When I refer to subsidized warehouses, I include within that term the warehouses specified in our complaint as alleged to have been subsidized.

I know of instances where the Bailey Warehouses have been compelled to shrink their normal warehouse charges because of the allowances granted to the warehouse companies receiving those allowances and I could name them if asked to do so. Having in mind our larger accounts a large number of those are affected by that, that is, shrunk to get this free labor service. It works out that all the well-known, big national concerns naturally are solicited by the warehouses with special contracts as well as by ourselves, and in all those cases we have to meet this competition, and it results in either our losing the business or our shrinking our normal charges to meet that competition.

There are a fairly large number of business concerns in this country who customarily use merchandise warehouse distribution whose business that we have abandoned hope of getting because of the allowances paid to our competitors and that free distribution service described in Exhibit No. 6. There are a large number of such accounts that it is useless for us to solicit. Instead of naming these concerns, I can deal with them by classes or by commodities. One large class would be food stuff merchants and brokers who will receive carload lots sent to warehouses in Philadelphia for distribution, and on such classes of commodities

it is useelss for us to compete, with certain of them who have done business or are doing business with the warehouses who have special contracts.

[fol. 334] Then another classification would be manufacturers of standard brands, particularly the manufacturers whose commodities make them use a great many carload shipments every year—that is, would naturally attract the warehouse special contracts because of the large tonnage of their shipments. Those fellows are doing business with the special contract warehouses and are pretty hopeless for us.

I mentioned the hopeless state of our getting the flour business a few minutes ago. It really amounts to this, that to deal with the great bakeries a barrel should have a storage rate of 15 cents, and the normal labor charge on a barrel like a flour barrel is 10 cents. As I said before, flour in barrels is warehoused at 9 cents a barrel in Philadelphia, with no labor charge.

With the warehouse not receiving an allowance for unloading of cars, they cannot hope to handle flour at 9 cents a barrel, when the regular rate should be 15 cents and 10 cents.

The Bailey warehouses have handled flour and we are equipped to handle flour. It is a nice business and it is good warehouse business, but in view of the allowances from the special contract warehouses we have not got a chance to get in. We are not handling flour at the present time. We have not had any flour certainly for a year. We have not stopped soliciting the flour business. We still go after it and try to get it, but as I say, if the man who deals in flour has had the rates given him that the special contract warehouses get, we cannot hope to get his business. We just cannot compete.

Mr. Bailey operates a warehouse which formerly was used by the Merchants Warehouse Company in handling flour. The name and location of that warehouse is buildings [fol. 335] 14 and 15 at the northern end of the block bounded by Delaware Avenue, South, Swanson and Bainbridge Streets.

The Merchants warehouses were operating in the northern half of this block from 1921 to the summer of 1923.

We bought the lower half of the block and were operating in the lower half of the block from 1922 continuously up to the present. When, in 1923, Mr. Bailey bought the upper half of the block he moved in, and we now have the entire block. While we were operating in the southern half of this block the Merchants Warehouse Company, operating in the northern half, received allowances on the cars unloaded at that warehouse, but when we moved into those two buildings the allowances were withdrawn on those two buildings, and while we were there side by side they had the allowances and we did not. There was a party wall between the two buildings at that time.

We can not pass this discrimination on to our patrons. We have to stand the brunt of the whole discrimination, because we cannot go to our customers and ask them to pay us such an overwhelming difference in costs for warehousing service, and ask them to pay us, we will say, for labor when they can go to one of the special contract warehouses and get 48 hours free delivery and labor much lower than we can give it to them. They will not do it. It is just as if you were going to buy the same commodity in one store or the other store, if one store asked half what the other did, you would buy in the cheaper place. It being a regular market proposition, we cannot pass it on. We have to absorb it. If we passed it on it would result in our customers transferring their patronage to competitors receiving the allowances.

[fol. 336] About 75 per cent of the tonnage of freight handled at our warehouses requires railroad transportation. If we handled only the local business not transported by railroad to or from our warehouses the revenue from that local business would not produce a reasonable return on our investment and would not produce a reasonable income on our property. I do not think it would pay taxes. We would starve to death. We are dependent on the freight which is transported to and from our warehouses by railroad. That is the life blood of the business.

The status of the Bailey warehouses is that it is a proprietary interest owned and operated by Walter A. Bailey trading as Bailey Warehouses. Walter A. Bailey is not incorporated and has no partners in the business with him. The services of the Bailey Warehouses in the warehouse

business in Philadelphia do not differ from the services of warehouses in Philadelphia generally. We do exactly as any public warehouse does in the way of distribution service. Our warehouses are located along the lines of the Pennsylvania Railroad. We have one belt line siding, pure Pennsylvania siding, another belt line siding and a Baltimore & Ohio siding. We own those sidings. We leased one of our sidings and the ones at Tasker Street are owned. The status of other warehouses as regards ownership or lease of sidings I cannot answer.

There is no difference, that I know of, with respect to the transportation conditions surrounding traffic into our plant as compared with traffic into the warehouses of other warehouse companies in Philadelphia. We have approached the defendants in this case in an effort to have them give us similar allowances and they did not choose to accord us the [fol. 337] privileges given the other warehouse companies. We have a letter from the Pennsylvania Railroad, I remember, in which they simply said they could not see their way clear to do it. It was just a refusal without very much explanation.

We can handle certain cold storage commodities, like minetta and bulbs, but we have not got a regular cold storage installation.

Cross-examination.

By Mr. Glasgow:

I have been in the warehouse business three years in Philadelphia and in Indianapolis I was traffic manager and manager of warehouse. I was in that business practically all my business life. I mean it has been my life business, the warehouse business, except when I was in the army.

Mr. Bailey has been in this business since about 1918 and then for the first time he embarked in this warehouse business. He had been previously in the rope and twine business. He started by taking a city block, bounded by Delaware Avenue, Tasker and Morris Streets, the old John T. Bailey Company plant, and converted that into warehouses, about 200,000 square feet, and then it has grown until now we have additional warehouses to that with which we originally started. Our insurance plan shows seven addi-

tional warehouse buildings and that has grown to that extent in the last ten years from the original one that I spoke of. We have not expanded since 1924. That grew, between 1918 and 1924, about six years.

The Bailey Warehouse Company does a modest business. I would not say a pretty sizable business, I have got to have [fol. 338] some index on the basis. We are not satisfied. I would not describe it as a prosperous business. Well, he stays in it. We have had some of our customers taken away by the Merchants Warehouse Company and some by the other warehouse companies here complained of. We have tried to take some of theirs and I suppose we have. A large number of our customers have no warehouses. Some of them have not got any offices. Some of them have offices in their hats and in other cities and others have their offices, if they have any at all, at their homes. Then some few or some of them have offices but none of them have warehouses where they could handle this business themselves—differentiate there, sir, between some of our customers who are tenants of ours. Some have their own warehouses, but we get their overflow business. The larger part of the people who are dealing in that kind of business in Philadelphia have no warehouses of their own but rely upon the public warehouses for this business. Our business in comparison with that of the Merchants Warehouse is much smaller and they serve a great number more than we do of people in Philadelphia who are availing themselves of the services of public warehouses. They are serving more than we do I believe.

By Mr. Glasgow:

Q. Your purpose is to either require that this allowance be made to you or that the expense of it be put on those that are now receiving through the warehouses under contract; is that your purpose?

A. No, sir, that is not our point of view at all.

Q. What is your point?

A. Our idea is here are a number of people in Philadelphia engaging in the warehouse business and they ought to have an even break, and they have not got it now, and if the Commission saw fit to withdraw these allowances, why [fol. 339] we would all more or less start from scratch.

Q. In other words, in order that you may get that allowance or that nobody will get the allowance you propose to put that expense on the shippers of Philadelphia. Is that not right?

A. No, sir.

Q. That is pretty near it, is it not?

A. No, sir. It is too absolute to be true. There are a lot of little things in it, like you talk about of this additional expense—in some cases where the special contract warehouses receive payment from the Pennsylvania Railroad for the labor of unloading their cars, they turn around and in addition charge a labor charge to their customers, thus being paid by two people for the same service. If you abolish the charges and thereby start from scratch, or will get fair pay from the man that receives the benefit of the warehouse service, and not get in on two sides. Let us illustrate. Suppose ten cars come in today to the Merchants Warehouse Company and are unloaded and distributed in 48 hours to the consignee or consignee's order. The shipper under those circumstances, or the consignee, as the case may be, pays nothing more than the freight rate to cover the whole service. If one car comes into our warehouse and is unloaded by us and distributed exactly the same way as the ten to the Merchants Warehouse Company the shipper, or the consignee, as the case may be, in our warehouse has got to pay that labor cost for doing that in addition to the freight rate.

My proposition is on the ten cars in effect is a rebate for people to ship by the Pennsylvania to warehouse it as an [fol. 340] inducement to draw more and more traffic. It operates like a rebate from the point of view of large shippers. It operates like a rebate.

Our company is engaged in soliciting business all around the country. So is the Merchants Warehouse Company and we meet in competition.

I estimate the value of the warehouse properties of Bailey at $2,360,000, figured the grounds worth at about $5 a foot at South Street and the ground at Tasker Street is figured worth about $4 a foot, our ground areas plus building areas, plus improvements. That did not represent the cost, because some of our buildings were built years ago. That is the fair value or duplication value of the properties. Some of them were bought some time ago. The last purchase

made was the 14 and 15 buildings, which were purchased in 1923. These were at South Street and is worth $5 a foot, the ground. In those two buildings, the ground area is about 20,000 feet—20,000 at $5.00—$100,000, for the ground, and then you have got the buildings. I do not know what the buildings cost when we bought them. When I am estimating that $2,360,000 and saying that we cannot make a fair return, I mean we certainly cannot make a fair return on the valuation of our property as of today. I consider a fair return—I would say 6 per cent of our valuation is a fair return. I am putting it in minimum terms and we cannot earn that much—we have not done it yet.

We do not handle things like eggs and butter and apples and things of that kind. We are not equipped for it. We have some tenants who do have cold storage but that would be their own property and not public warehousing. They are equipped for that kind of business—that is a large part of their business as far as I know. We do not handle it and our tenant handles it in the leased space allotted to him. [fol. 341] We may help him with the labor of his cars, that is all.

By Mr. Bikle:

In referring to the connections we have with the railroads, I spoke of the belt line. Through that line we have access to all three roads that serve Philadelphia. I also referred to the fact that approximately 75 per cent of our business is business that has moved or will move over the railroads and that I said came from and went to all parts of the United States. A minor fraction of that originates or goes to Pennsylvania points. We do have business connections throughout the State of Pennsylvania. We ship to and receive from points in Pennsylvania. We do not have an ownership interest in the freight that is handled to and from our warehouse. Take the inbound freight first that is consigned when coming to our warehouses by the Pennsylvania Railroad. It will come in to John Jones care of Bailey Warehouses, and on the outbound business, why, sometimes we have the customer's name appearing, with our name as the shipper, and sometimes we simply have our own name on it. Sometimes we do sign the bill of lading in our own name, as to which is the customary and more frequent practice, if there is a difference between the two—

I would think it would be about fifty-fifty. In any event those outbound movements are all in accordance and in compliance with the owner's instructions. It may not be the owner who gives us the instructions. It may be an agent or it may be a broker or it may be—In connection with all the outbound shipments we deliver them to the railroad for transportation at the behest of some other person and we send them to some destination that somebody else [fol. 342] tells us to send them to and somebody who has a right to tell us what is to be done with that freight. That is, we are carrying out somebody's instructions when we make these outbound deliveries to the railroad. In other words, we ourselves are not determining for ourselves where to ship them. Very often we determine the routing, but your point that we get instructions, shipping orders, is correct and we determine the routing because the owner of the property or his agent leaves it to us to do that sometimes. In other words, he has the right to do that if he elects to do so, as between us and him. Now, I referred to the fact that if a carload of freight came to Philadelphia and was handled through the Merchants Warehouses and was delivered within 48 hours the consignee taking it away, say so many barrels one trip and so many another, he would not have to pay anything for the handling at that point. That is not exactly true at the regular railroad station operated by the railroad itself and not through these special contract warehouses. It differs in several essential points. In one, if you are getting a carload of freight delivered through a regular freight station at that freight station the railroad company takes the goods out of the car and puts them out on the platform. That is one thing they do. Then you come up to get them and you sign your receipt to the railroad and there is your bill of stuff and you can haul it out. You may have to put a man to sit on that pile and watch it while you are away. That differs from the warehouse practice in the one point that the warehouse is the custodian, and though we may be taking it out in dribs we keep our eye on it. In the case of the freight house once they get the receipt you have to hire a man to sit on the pile [fol. 343] until you take it away. It is very valuable stuff. Then you can take the stuff away in dribs, but you have to haul it away. The warehouse distribution proposition is entirely different. Your carload may come in by the Penn-

sylvania Railroad the same way. Then the warehouse has the responsibility of taking the car for you, watching your stuff, if you take it out in 48 hours or in a week; see that the right men get the right stuff; that the car is in good condition, and they will even collect charges from the various people who come to get parts of the car, plus handling, and they will pay the demurrage on the car, if anything. I am talking about carload. The differentiation between the warehouse and freight station service is that the warehouse does all of these other things which the freight station service never contemplates. In that answer I am assuming the railroad will not give very much protection to the freight once we put it on the platform. But apart from that, as I view it, the owner can come there and take it away in the same part deliveries until the free time expires, without being subject to any charges. I referred to the fact that sometimes we paid freight and demurrage, etc., on cars that were handled through our warehouse. It is not true that in the cases where we did that that constituted a part of our bill against the owner or his representative, of those goods. No, sir, we do not pass demurrage on, that is our party, and in some cases we do not pass on the whole freight. Part of our service, different from a freight station, part of a warehouse service is to take a man's cars and unload them, and if we do not unload them promptly so that we incur demurrage charges, that is our fault. Under these circumstances we would not charge him the full freight charges. [fol. 344] Where we get a car, as in this case, you might have a shipment coming in competing against the special contract warehouses on which you are compelled to shrink your charges materially—say give no labor charge. We will turn around and bill him less than our combined freight and handling and storage.

My answer was no, not in all cases did we pass on the full freight, and in some cases where we shrink charges we did not pass on the complete charge to the consignee, because it might be to several or to one. In the majority of instances we pass on the entire freight charges.

Q. It is only in a very exceptional case that you shrink the freight charge?

A. I would not make it "very." That is too small. There is too much competition from the contract warehouses to make it very exceptional.

By Mr. Webber:

We handle more tobacco than anything else, any one single commodity.

As to whether it is customary for the railroad itself to unload carload freight for consignees—frankly, I have never seen it done; I will have to answer it that way.

We have six or seven, possibly eight or nine—six or seven certainly tobacco customers at the present time.

By Mr. Woodcock:

The size of our warehouse originally was 200,000 square feet. The present size is about half a million square feet.

Q. Your investment that you spoke of, $2,365,000, does the greater part of that—I did not mean investment—I meant you valued the properties at $2,365,000—is the greater part of that value related to properties which you [fol. 345] owned when you started ten years ago, or properties acquired since that time?

A. I would say about fifty-fifty. I would like to explain that, that the property which we started with was located way down on South Delaware Avenue and it was necessary to get more centrally located property. Hence the acquisition of the additional property was more or less forced by business policy rather than being the result of tremendous profits reached and reinvested in the warehouse business.

Q. Your reference to the method in which shipments were consigned that moved to you via the Pennsylvania Railroad and your statements regarding those outbound shipments would also apply, would it, to shipments that were handled by the Reading Company and moved into your warehouse?

A. You mean in the method of handling?

Q. No. In the method in which the shipments were billed. You spoke of that being billed John Smith care of the warehouse.

A. Yes, sir, that is, the freight bill will say John Jones care of Bailey Warehouses, in general.

By Examiner Brown:

Q. Our investment figure covers just the physical properties of the Bailey warehouses, there is no good will in that. It is based on a real estate appraisal of land and buildings and equipment, such as elevators, platform and things like

that, handling equipment, in other words our physical property which we use in the warehouse business.

CHARLES P. FOSTER was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

[fol. 346] By Mr. Hickey:

My name is Charles P. Foster, employed by the Northeastern Warehouse Company which is a complainant in this case, as solicitor and traffic manager, and acting assistant superintendent. I am also a stockholder in that company. The Northeastern Warehouse Company is engaged in the general storage business, merchandise, except of course anything that is too hazardous, or furniture, household goods, we do not accept it. The Northeastern Warehouse Company has been engaged in the warehouse business in Philadelphia about 25 years. I have been in the service of that company 18 years.

Our office is located at Sedgley and Erie Avenue, Philadelphia and we have a warehouse at that location. We have a capacity for indoor storage of about 175,000 square feet. Then we have half an acre of ground, of course not covered, for anything that requires outside storage. It is a building of five stories and basement; cellar. We conduct our warehouse business in that building. We are capitalized at $500,000. Of course the value will exceed that. If you want an estimated value, why I would put it at about $800,000. We conduct a general warehouse business, receiving and delivering merchandise, unloading and moving cars, etc., a general merchandise warehouse business, public warehouse. We have sidings at both the Reading Company and the Pennsylvania Railroad Company. I would say about 85 per cent of the receipts of all our goods come in by rail, and of course there is some which is trucked to us by teams. About 80 or 85 per cent comes in by rail. It may exceed that a little. The outbound I guess would be about 70 per cent by rail. If the Northeastern Warehouse Company had only that local business not requiring railroad transportation inbound or outbound, its business

would not be profitable. There would be no Northeastern [fol. 347] Warehouse if we did not have the outbound business by rail, because there would not be sufficient business up there to warrant having any warehouse.

To the Northeastern Warehouse Company railroad transportation is of very great importance, because we have sidings at both railroads, and, as I said before, if it was not for the railroads and the merchandise that came in by rail there would be no warehouse there. We are not located right upon a river front, you know, and therefore we have to depend upon rail for our business both inbound and outbound.

For the Northeastern Warehouse Company to get business we advertise; advertise in magazines, circulate calendars, and we solicit persons all over the city and by circular letters through magazines, distributing calendars, and through our New York representative.

Q. I show you what purports to be one of your circulars and I will ask you if you can identify it as such?

A. Yes, sir.

Mr. Hickey: I offer that in evidence.

(The document referred to was received in evidence, marked "Complainant's Exhibit No. 8, witness Foster.")

The railroads we deal with in obtaining property for inbound transportation and also in obtaining property for outbound transportation are the Philadelphia & Reading Railroad and the Pennsylvania Railroad. Our warehouse is served by private sidings: We have one siding on the Pennsylvania that comes in the center of the building, and the other one on the Reading goes along lengthwise. We [fol. 348] have capacity for about three cars on the Pennsylvania and about eight or nine on the Reading.

The services performed by the Northeastern Warehouse Company on our inbound freight are: We get notice from the railroad companies of the cars' arrival and we order them on our sidings, break the seals and discharge them, place the contents of the cars in the warehouse. That is the unloading part. Of course the loading part we do all our handling of the merchandise in the cars, load it in the cars, seal them, send the bills of lading to the railroad station, get them signed and forward them.

On the inbound shipments we receive a communication from the owners of about when it is expected to arrive. We notify them upon the arrival of the cars and then they tell us as to what to do. In other words, if any separations are to be made they give us the orders, or otherwise, in writing, and we place the contents of that car in accordance with their directions, in the warehouse.

By separations I mean this: For example, there may be, of course you take wools, there may be three or four different grades of wool in one car, and when that goes out there may be one grade that would go out first, and another grade would go out second, and the third grade would go out last, and therefore of course we separate those different grades in accordance with the marks when they are unloaded from the car, check them in the warehouse and pile them in the warehouse separately. As a general thing—sometimes we receive the orders for those separations by mail and then again we will receive them by phone, but if they phone, as a general thing they always confirm it by letter through the mail or else messenger.

Now about property distributed from our warehouse by truck service—goods which are received by the warehouse [fol. 349] and sold to be distributed in Philadelphia, when the teams come for that they of course have an order from the owner or the representative of the owner, and then we deliver those goods to the sill door of the truck for delivery. For example, there are many cases where mills, of course, have those goods in the warehouse, and they send their own trucks for those goods after the order has been placed by the owner. It may be a mill to whom the owner has sold those goods, and that mill comes for the goods and they will be delivered upon their order.

As to whether this trucking to which I refer involves the distribution of carloads to the various mills in Philadelphia or several parties in Philadelphia—well, carload lots that come in as a general thing are consigned to a firm which handles that commodity care of the Northeastern Warehouse Company. Then they sell them to different parties. They may of course sell a portion to one concern and a portion to another, and so forth, and give them orders upon us for whatever quantity they have sold to this firm. We honor that order and deliver to the trucks at the sill door. We distribute the carload in small lots in accordance with those orders.

The largest percentage of our patrons are located in Philadelphia. There are very many of those patrons in Philadelphia who have offices only. Some may only have desk room in an office. Then again there are others who perhaps may rent a building, but that building not being sufficient to take in the goods which they handle therefore necessitates their having such storage space. Besides that, in handling bonded goods they could not take the bonded goods into their own place even if they had sufficient room for it there. Of course we have some out of town customers who have representatives come to Philadelphia to [fol. 350] sell the goods, and consign the goods to our care, and then in turn send their representatives here to sell, and then we honor their withdrawal orders from the warehouse to whomever they sell the goods.

Boger & Company is one of our customers. They handle cotton and cotton waste. They of course have their cotton came from the south consigned to them in our care and we store it, and then honor their orders as they sell, either in town or out of town, wherever it may go. They have no facilities for receiving carload freight. They have only an office. Otherwise, one floor in a building. That is raw cotton. This office is in a prominent office building or a district of the city where property values are high. It is not exactly what you might call an office building. It is a building rented out. They only occupy two floors. It is located on Chestnut Street. So there is very little cotton stored on Chestnut Street. There is a reason for that most undoubtedly. In the first place the insurance rate would be pretty high. That is in the fire belt. In the next place I do not think the insurance underwriters would insure a building if it had cotton in it down in Chestnut Street. Those people who have business places on Chestnut Street to receive a carload of cotton in Philadelphia, they have it consigned right from the South to us, or otherwise in our care. They employ us as a warehouse to receive their cotton. Chestnut Street used to be one of the principal business streets of Philadelphia, but since they got the Delaware River bridge I guess it is kind of diminishing. Property values on Chestnut Street between 8th and Broad Streets are not so low that they could afford to use those facilities for receiving carload freight. The value has gone up between 8th and Broad, but the value has receded between

[fol. 351] 8th and Delaware Avenue. Then there is some reason why people having business places in that section of Philadelphia employ warehouse concerns to receive their carload freight. Of course it would be too valuable for a person who had a building there, even at the present time, to try to store anything. As I said before, it is in the fire belt, and the insurance rates would be very high, and of course warehouses have to be built where the rental is low and property or ground is less valuable. Otherwise they could not come in to the center of a city and establish a big warehouse.

The Northeastern Warehouse Company competes for business with the Merchants Warehouse Company and the Pennsylvania Warehousing & Safe Deposit Company. We have had difficulty in obtaining business in competition with those two companies very frequently. Take as an example cotton or cotton linters. There was a time a few years ago when we were stacked up with cotton linters. After the Merchants Warehouse Company took over the warehouse there where the old sugar plant, the Franklin Sugar Refining plant, was where they are located now they of course began to store cotton linters. That plant runs from Front to Water Street.

He, Mr. Dickson, was describing the Bailey Warehouses, but the Merchants are located right near them, across from the Franklin. When we enjoyed the business of the cotton linters our customers told us that "we cannot do anything with you any more."

"Why?"

[fol. 352] They said, "Well, we have so many more better advantages from the Merchants Warehouse Company than you can afford to give us."

"In what way?"

"Well, for example, we can have a car of linters shipped from the south, consigned to use care of the Merchants Warehouse Company."

They already had the samples.

Now perhaps that may be three or four days in transit.

"In the meantime we can dispose or otherwise have an opportunity of disposing of that car in transit to be shipped outside of Philadelphia. When it arrives in Philadelphia we are eagerly anxious to see as to whether the goods come up to sample. They run it into the Merchants Warehouse

Company. They take it out of this car. We are going to ship it out, as we have sold it. They put it into another car and ship it out and it does not cost us a penny to do that."

They say "Can you compete with them?"

The transfer from one car to the other does not cost the consignee a cent. He says "Can you do that?"

We say, "No."

Then he says "How can you expect to get our business?"

The result is we lose it.

We have had parties say to us, "Well here, if you cannot give us 48 hours free storage we cannot give you our business."

We say "We cannot afford to do that. If we only charge you the same labor charge as the Merchants Warehouse will charge you, how can we afford then to give you free [fol. 353] storage for 48 hours? We would be giving away gold dollars for greenbacks."

They say, "Well, we are sorry. We will have to give it to those who give us the best or the cheapest."

And we cannot afford to unload those cars for nothing. We cannot afford to give them 48 hours for nothing.

When, for example, the merchant would charge 20 cents a bale storage and 15 cents a bale labor, we charge the same, and they being a subsidized warehouse, if they receive from the Pennsylvania Railroad 25 cents a ton—it would take about four bales of linters to a ton—that would be very near 9 cents a bale which they are receiving for labor, inbound, more than what we would be receiving, and if it happens to go out again they will receive 9 cents a bale more. That is 18 cents a bale they would receive more than what we will receive for the same service. Otherwise, I would be getting 15 cents a bale for unloading those linters, putting them in the warehouse, taking them out and putting them in the car again, whereas they would get 15 cents a bale and then 70 cents a ton in and out for handling charge from the Pennsylvania Railroad.

The Merchants Warehouse Company of course gives the 48 hours free time storage. We cannot afford to. We would be driven out of business. In one or two cases we were compelled to do it, or otherwise we would lose our customer entirely if we did not. The 48 hour storage also includes

free handling at the Merchants Warehouse, that is what we have to meet. A man can put it in there and let it stay there and in 48 hours ship it out again, and he does not [fol. 354] pay anything at all. That same competition also applies to virtually all the other commodities that we handle. As to whether that same competition arises in connection with the business of most of our customers or just a small number of our customers, well, I would say that quite a few we run up against and that if we not meet that competition then the business drifts away from us. But it has gotten down now to where the margin is so small that there is hardly a living in it on account of the subsidized warehouses. The warehouses I refer to are the local Merchants and the Pennsylvania Warehousing & Safe Deposit Company.

If called upon I am able to name some customers that we have lost to those two competing warehouse companies that receive allowances because of the free labor service. We were compelled to reduce our normal warehouse charges because of that competition. We were forced to. I know of business that is hopeless for the Northeastern Warehouse Company to solicit or take if they could get it in competition with these warehouse companies that receive the allowances, and we have abandoned hope of handling that business. At one time we enjoyed quite considerable flour. And it is fruitless for us to endeavor to get canned goods. We have given up the effort to get the canned goods and the flour also because the more we handled the worse we would be off.

Taking the flour first. At one time we handled considerable flour for the largest bakeries there were in Philadelphia, and they came to us and told us we would have to reduce our rate, they could get it done for so much cheaper.

I said, "Where?"

[fol. 355] They said, "The Pennsylvania Warehousing & Safe Deposit Company will take it very much lower than you take it. Can you compete with them?

I said, "Not at those figures."

I just forget now exactly what those figures were at the time, but they were so ridiculous we simply had to abandon the flour business and look for some other substitute.

The same thing applied on the canned goods. We only very recently had a letter from a large concern in New

York, and they replied to us that we were away out of proportion. We could not get the business and we had put it down to the lowest possible figure, because our labor charges, we figure on the warehouse business now we have got so low that we lose money on everything we handle as far as labor is concerned, and we have got to make it up on the storage, or otherwise if the storage did not show us a profit we would be away behind. We never get fully paid for what labor we perform.

All of the space which I stated was 170,000 square feet of storage space, has not been utilized to its full capacity by the Northeastern Warehouse Company for the storage and handling of goods during the period from May 1, 1926, to the present date.

We have not been up to our 60 or 70 per cent capacity fully at any time during that period, not over 60 per cent.

The reason why we had so much unused space was that competition became so much greater, warehouses became more numerous, the Merchants Warehouse put a warehouse here and a warehouse there and a warehouse everywhere [fol. 356] else, they built like the chain stores and grocerymen in Philadelphia.

The Merchants Warehouse now has warehouses too numerous to mention. I forget just exactly how many they have.

The allowances or the free handling service offered by the Merchants Warehouse Company and the Pennsylvania Warehousing & Safe Deposit Company undoubtedly had its effect upon our ability to get enough freight to use the entire capacity of our warehouse. The Northeastern Warehouse Company is prepared to handle all kinds of merchandise; hazardous goods that the underwriters will permit us to take, together with all raw materials, manufactured goods and merchandise of every character, with the exception of, as I said before, household goods. It has actually handled a very wide range of package freight. The Northeastern Company, Mr. Examiner, handles a varied amount of package freight at the present time. We have withdrawn from the cotton linters, canned goods and flour business. We can afford to handle other business but cannot handle that because there is so much competition

in that flour business, as I understand. They tell me that the labor is cut down to nothing; so we cannot afford to unload it and put it in the warehouse and pile it up and deliver it for the prices which they claim they get. Therefore we have withdrawn from that business. Yet while we had bakeries within close proximity to us, which we would be much handier for them to store in than it would be to store elsewhere, we could not compete with the subsidized warehouses.

We have asked the defendants to accord our company the same allowances as are accorded the so-called subsidized warehouses.

[fol. 357] I called on Mr. Large, the traffic manager at that time, in 1927, of the Pennsylvania Railroad, and I had occasion to go see him on account of them placing a tariff in effect of cotton storage in transit and with that tariff they had named only the sidings of the Merchants Warehouse but forgot there was any other warehouse in business that had a Pennsylvania siding. They afterwards did accord us the same privilege. Mr. Large said it was a mistake—Mr. Miller had made up the tariff, or otherwise, the sidings, etc., and the tariff was printed.

As to whether, when I replied to the Examiner, I had in mind a milling in transit privilege or the matter of these allowances, I had rather in mind the allowances together with the cotton transit privilege. That came up in the conversation, and I complained to Mr. Large in reference to the subsidized warehouses at the time, and if you want me to explain it to you I will say this: That Mr. Large said, "Well, that has been in existence since the time the flour came in, and we had to turn it over to the warehouses in order to save our terminals" I said, "We are just as much a terminal of the Pennsylvania as the Merchants Warehouse. We discharge the cars and place it in storage. We are just as much of a terminal as they are. Why don't you give us the allowance or take it away from them and put us all on an equal basis?"

At the present time none of the railroads accord us this privilege. At no time in the past did they accord us the same privileges as they have these other so-called subsidized warehouses.

[fol. 358] Cross-examination.

By Mr. Glasgow:

I have been in business 25 years and have been with the Northeastern Warehouse over 18 years. We are about eking out an existence. Our warehouse is located in the northeast section of the city. The nearest other public warehouse to us would be Rex's Warehouse, Morgan and York Streets. That is about nine or ten squares from us. The nearest Merchants Warehouse Company's warehouse to us is one over there at Shackamaxon Street—about half a mile or a mile—about a mile, I guess. It may be a mile or a mile and a half. I never measured it, but I judge that is what it is. Take the Pennsylvania Warehousing & Safe Deposit Company, they have one at Delaware Avenue. They have one down there at Delaware Avenue. That is about four miles. The nearest warehouse of the Philadelphia Cold Storage & Safe Deposit is about two miles or two and a half from us. We are towards the mill district of Philadelphia. We are probably the nearest public warehouse to the cotton mills and the woolen mills up there. We do a pretty considerable business in cotton and wool. That is a very large percentage of our business. There is a large percentage of that cotton that has the transit privilege with it. I don't know as a fact that on cotton that has the transit privilege there is no allowance by the railroads to the Merchants Warehouse Company or these other companies. I do not know anything about that part of it. I do not know what they get. They never told us what they did get, so I do not know.

We have lost some customers to the Merchants Warehouse Company. If I have taken some customers from [fol. 359] them, I do not know it. We tried to and have not been able to take any. They have taken some from us though. We enjoyed a considerable business in flour at one time, about four years ago. About four years ago we had business in flour, but we lost it. When we got it, we got it from merchants in Philadelphia. American Stores Company had the business that we got. The reason why we got that flour at that time was because they had a bakery there on Allegheny Avenue, which is a short distance from us, and the bakery is there today but does not come to us

any more. American Stores owns the bakery. They furnished their own flour before and they stored with us. They now furnish their own flour and they do not use our warehouse. The same allowances were in effect to the Merchants Warehouse Company at that time that there are now. Maybe the American Stores were not wise enough to know it at that time. We knew it, but naturally did not tell them.

I don't know that it is a fact that the American Stores Company does not use any warehouses, I mean public warehouses, and have their own. No, sir, I do not. I know different from that—I mean for the storage of flour. They may at the present time, or otherwise very recently, but I know they did use public warehouses. They used us. It may be true that they use only the public warehouses in case of emergency when their own warehouses are filled. I know that they have a few large warehouses of their own for the storage of flour.

I presume the bakery that I speak of is now furnished by them with flour.

The use of space in our warehouse does not vary from season to season. No, sir. As a general thing it will even [fol. 360] up. Where one article will be out of season another will be in.

When I gave my estimate of 60 per cent or 70 per cent I meant that was that percentage of all the inside storage space we had up there. I did not give any estimate of the ground because that is vacant. There is nothing on that at all. We only have that in case of necessity.

At the present time there are a few mills up in northeast Philadelphia that are operating full capacity and very many that are not. The last year there was quite a depression there in the business. It used to be that when the mills were dull we were busy because if they were not using the stuff they would put it in the warehouse. If they were not selling it they would put it in the warehouse, but that is not so now. The depression in the cotton and wool business affects our business some.

By Mr. Bikle:

As to whether our business is at all affected by the fact that merchants do not carry as big stocks as they used to on account of the greater regularity of the railroad service,

well, that might be to some extent, yes, but of course where there is a greater number in business, as they are increasing, every time when one door opens another closes.

I refer to Rex & Company as being in the business of warehousing somewhere in our neighborhood. Rex & Company are competitors of ours to a certain extent.

Our competitors include the Merchants and the Pennsylvania and of course the other independent warehouses, [fol. 361] they are competitors, all competitors of one another. When I say the other independents, I mean Mr. Rex's warehouse, Mr. Bailey's warehouse, and take our own—we are competitors of each other. There are no others besides those that are complainants, no, they are the worst.

We are able to fight our way with those very nicely that are not so bad, but we cannot fight our way with the subsidized ones.

I do not know of any other independent warehouses in Philadelphia besides these complainants. We get some little business from points inside Pennsylvania as well as from points outside.

On the traffic that comes into our warehouse and is handled through it, it is consigned as a general thing to the owner in our care. On the outbound traffic when we are directed to ship outbound we ship in the name of the owner who gives us the shipping directions.

I explained these various services that we render at our warehouse, and said we did that in accordance with the instructions of either the owner or his representative, and practically all the service we render, either on the inbound or the outbound freight, we do at the direction of and in accordance with the instructions of the owner or his representative.

I do not say whether it was the Merchants or whether it was the Pennsylvania Warehousing & Safe Deposit Company took away our flour business. It was taken away by one or the other. This business was taken away from us by these other warehouses quoting a low rate, about four years ago, this was. We had a large amount of flour about three or four years ago and it was taken away from us by [fol. 362] quotation of lower rate. As I said before, maybe they were not fully acquainted with the fact of what the flour rate was. I do not know what the present flour rate

is because I have not bothered with flour. I know we could not handle it at this time. I cannot call to memory just exactly now what it was three or four years ago.

The rate we were receiving at the time when we had the flour, I was told that our rate was entirely out of proportion, too high. So therefore when they told me "If you want the business at the same rate"—I forget just exactly what it was at that time, "If you want the business at the same rate, why you can have it." I said, "I do not want it. There is no use in giving up good money."

[fol. 363] Room 1103 I. C. C. Building,
Washington, D. C., Tuesday, July 31, 1928.

The hearing in the above matter was resumed, pursuant to recess, at 10 o'clock A. M., before R. M. Brown, Attorney-Examiner.

Appearances: Same as heretofore noted.

Cross-examination of C. P. Foster resumed.

By Mr. Woodcock:

We have no facilities for handling any perishable commodities, such as are ordinarily handled by the cold storage warehouse.

We are handling very few cotton linters at the present time. We handle some little cotton; not as much as we formerly did. The size of our warehouse has been increased since it was originally constructed; an addition was put to it about 20 years ago.

By Mr. Glasgow:

We are capitalized at $500,000, the par value of our stock is $100 a share. It was not all paid in. About three hundred eighty some odd thousand dollars was paid in. The assets of our concern in property now is $800,000; that is about the valuation of it. So that it has increased from [fol. 364] $360,000 to $800,000. We have not put any of our earnings back into the property. We paid the earnings out in dividends. We pay dividends now at the rate of five per cent on three hundred and some odd thousand

dollars—on the stock. There is only a little over $380,000 of stock issued. We have a little surplus; not much, approximately maybe about thirty or forty or fifty thousand dollars. We did not put anything to surplus the last year. We paid everything out.

Redirect examination.

By Mr. Hickey:

The warehouse company has no outstanding bonds or mortgages. It has no promissory notes and loans outstanding.

The Northeastern Warehouse Company complained to the Pennsylvania Railroad in writing concerning the giving of the allowances. We complained to them in letter of January 10, 1928. We received a reply from Mr. Large, general traffic manager of the Pennsylvania Railroad Company, under date of January 14, 1928. Those two letters are before us and read as follows:

Philadelphia, January 10th, 1928.

Mr. J. L. Eysmans, Vice-President Pennsylvania R. R. Co.,
Broad Street Station, Philadelphia, Pa.

DEAR SIR: We noticed in a recent issue of the Traffic World, that the Interstate Commerce Commission in a [fol. 365] report by one of its examiners, ruled that the Pennsylvania Railroad Company must stop discriminating against the McCormick Warehouse Company at Baltimore, by giving allowances to the Terminal Warehouse Company, and refusing such allowances to the McCormick Warehouse Company.

Our Traffic Manager, Mr. Foster as far back as 1921 personally made complaint to Mr. J. B. Large, then Freight Traffic Manager, about this unjust discrimination in Philadelphia.

Please advise if the Pennsylvania Railroad Company will relieves us from the unjust discrimination, either by discontinuing the allowances to the Merchants Warehouse Company, and the Philadelphia Tidewater Terminal Company, or by giving us such allowances.

Very truly yours, Northeastern Warehouse Company. Blair R. Miller, Superintendent.

BRM/LPD.

The Pennsylvania Railroad Company

Philadelphia, January 14, 1928.

Mr. Blair R. Miller, Supt. Northeastern Warehouse Co., Philadelphia, Pa.

DEAR SIR: Referring to your letter of January 10th to Mr. Eysmans, regarding complaint of the McCormick Warehouse Company—ICC Docket 15445:

The facts are that the report you read in the Traffic World is only a tentative report of the examiner in the case, and no action will be taken by our Company until the Commission actually decides the case, after which I will be very glad indeed to sit down and discuss the matter with you.

I remember very well discussion with your Mr. Foster several years ago and fully understand your position. As you know, there is a great deal involved in the whole situation, and, as stated above, there is really nothing we can do pending the decision of the Commission.

[fol. 366] Trusting that this is satisfactory, and thanking you for bringing the matter to our attention, I remain,

Very truly yours, (Signed) J. B. Large, General Traffic Manager.

In this letter Mr. Large states he remembers very well a discussion "with your Mr. Foster several years ago." I have a recollection of that discussion. I went to see Mr. Large in reference to a tariff which they had issued in regard to cotton. The matter was brought up about allowances.

I stated to Mr. Large I thought it was very unjust to give this allowance to the warehouse, that it was nothing more than a gift. Mr. Large replied an stated, "Well, it is the custom" that had been followed since years ago when, practically, there was no demurrage charged, when the railroads were allowed to rebate and also that there was no definite time for the freight to remain at the stations.

[fol. 367] I said "That is very antiquated. Other cities have done away with it. Why should Philadelphia and why should we be discriminated against? Why should we tear down one institution to build up another. You will drive away whatever business we have. I consider it is nothing

more than a gift you are giving to the warehouses, and practically, you might say, a rebate in a different form, in whatever form it was. The consignees enjoy it on account of the very cheap rate that the subsidized warehouses are permitted to give and they will drive out the independent warehouses from the business, and, therefore, they are getting some little benefit in the form of rebate."

Mr. Large said they would very gladly get out of it and do away with this allowance, but under the circumstances with the Baltimore & Ohio allowing it in Baltimore, therefore, of course, they had to allow it in Philadelphia; otherwise they would be glad to get out of it if they could and eliminate it.

(Witness excused.)

Mr. Hickey: Can we put in our stipulation on the billing?

Mr. Bikle: The stipulation into which Mr. Hickey and I have entered is this: The waybills of the Pennsylvania Railroad called for by counsel for the complainant show two forms of consignment. In one covered by six billings there appears in the space designated "consignee—address (final destination and additional routing)" "Merchants Warehouse Co." with address.

In the other, covered by eighty-seven billings, there appears in the same space the name of the person or company that shipped the freight "care of Merchants Warehouse [fol. 368] Co." For example, in the space "consignee—address (final destination and additional routing)" appears "Vacuum Oil Company, care of Merchants Warehouse Co." with address.

Mr. Hickey: That I agree may be stipulated into the record as the joint conclusion of Mr. Bikle and myself.

Mr. Bikle: Now, in addition, I want to make a statement on my own behalf or, rather, on behalf of the Pennsylvania Railroad, that the allowances under the tariff are not payable on shipments consigned to or by the warehouse and we are not undertaking to defend the propriety of any such allowances. As a matter of fact, in the cases referred to, in three instances, the warehouse company paid us back the allowances and in the other three they will be the subject of bills.

I want to say, too, Mr. Examiner, when Mr. Hickey filed his petition for re-hearing in the McCormack Warehouse

Company case, Docket 15,445, I think it is, he alleged that we were paying to the Terminal Warehouse Company at Baltimore on traffic consigned to it or by it as against the provisions of the tariff and that caused us to make an examination which developed that that was true in certain instances. When we discovered it was true there, we also started to make an examination in Philadelphia, or did make an examination in Philadelphia, and that was the occasion for recollecting back the payments that we discovered here; three of these billings were late in the month and did not come within the check. I say that because I want it made clear that we are not undertaking to defend payments where the shipments are consigned by or to the warehouse.

Examiner Brown: The stipulation will be considered as [fol. 369] a part of the evidence.

James A. Mooney was thereupon called as a witness on behalf of the complainants and, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hickey:

My name is James A. Mooney. I am general manager of the Industrial Cold Storage & Warehouse Company, one of the complainants in this case. The Industrial Cold Storage & Warehouse Company is engaged in the business of cold storage and warehousing at Philadelphia, Pennsylvania. That company has been in the warehouse business in Philadelphia since 1905. I have been connected with its business and affairs since the same year. Its general office is located at 1905 North American Street. Its warehouse is located at American and Birch in the City of Philadelphia. The warehouse is served by private sidetracks connecting with the Reading Railway. Freight is shipped outbound and inbound to our warehouse over the Reading Railway. About 85% of the tonnage of freight handled at our warehouse is afforded transportation by railroad.

If that 85% was eliminated and we had only the remaining 15 per cent local business not requiring railroad trans-

portation, we would not be able to conduct our warehouse business as a profitable enterprise. The remaining 15 per cent would not pay expenses or taxes. The kind of freight handled at our warehouse is all perishable products, such as butter, eggs, cheese, poultry, fish, dried fruits, condensed milks, powder milks, fresh fruits.

The officers of the company and the solicitors solicit [fol. 370] business personally, through advertising mediums and letter-writing.

On page 37 of a trade publication entitled "National Poultry and Egg Bulletin" issue of May, 1928, there is an advertisement of the Industrial Cold Storage & Warehouse Company. I caused that to be inserted.

Mr. Hickey: I offer that in evidence.

(Said document, so offered, was received in evidence, marked "Complainants' Exhibit No. 10, Witness Mooney".)

The controlling conditions that causes freight transported by railroad to be routed to our warehouse and routed to warehouses of our competitiors are the facilities offered by the Industrial Cold Storage & Warehouse Company. The measure of the charges have a bearing on it.

To be a little more explicit, a car of eggs, we will say for the sake of argument, may be consigned to the Industrial Cold Storage & Warehouse Company and on arrival over there at the Industrial be delivered over the platform. The items of cost that attend the handling of this freight that is routed by railroad to our warehouse are the storage charges principally. Freight rates do not have any bearing on it for the reason that freight rates to the Industrial would be the same as to the other houses, and you would have to eliminate the handling charge to meet this competition. The handling charge is of importance in the matter.

I might explain it in this manner. As stated previously, our storage rates are the same, but in order to get the business, we simply have to absorb that handling rate in our storage charges.

[fol. 371] We solicit the shipment of this butter, egg and poultry business from points outside Philadelphia. The costs of marketing those goods, using our warehouse as a medium of distribution, are the freight rates, plus the unloading, handling and storage charges.

Our competitors are the Philadelphia Warehousing & Cold Storage and the Pennsylvania Safe Deposit Company. We object to the allowances given to those companies by the railroad company for the reason that due to that condition, there are certain lines of business that we have to pass up, due to the fact we cannot allow that handling charge. That competition works along in this manner: A car of perishable products will be consigned care of the Industrial Cold Storage & Warehouse Company and might be intended for storage, and it arrives in Philadelphia. The contents may be sold to a customer of the consignee and hauled over the platform. If we attempt to make a charge for it the business is taken away with the excuse that the other warehouses were giving free cold storage facilities for forty-eight hours and no charge made for handling. We lose the business if we do not meet that competition. We can't meet that competition for the reason that our storage rates are nominal to such an extent that we could not absorb this handling charge. In addition to that, the free refrigerating charge allowed by our competitor.

If we granted the equivalent in free handling service, we would lose the handling costs, which we figure about fifty cents a ton—forty to fifty cents a ton. I might correct that. That means we would have to do business for nothing in competition with our competitors who offer this free [fol. 372] handling service. We have as customers who patronize cold storage warehouses in Philadelphia the producers and shippers in the west who have no representation on their behalf in Philadelphia. The Industrial Cold Storage & Warehouse Company is asked to serve as representative of these western producers. We perform their distribution in Philadelphia. Their goods come in in carloads at carload rates. We distribute the contents thereof. For instance, we will get a shipment of four hundred cases of eggs. That may mean ten—perhaps twenty—deliveries of twenty cases each, in the case of twenty deliveries, to make the four hundred. That is, the four hundred pieces will be one carload lot and the ten to twenty separations mean we would divide and deliver that carload lot of goods to ten or twenty different persons.

We know who to deliver it to as we have instructions from the shipper, or producer rather, to deliver John Jones or William Smith on payment of so much per dozen. Those

instructions come to us by United States mail, mailed to us at the time the car is shipped to our warehouse.

We have a number of customers who are located in Philadelphia or who operate offices there. The commodities they deal in are butter, eggs, cheese, poultry, fish, dried fruits. Some of them are brokers; some are retail dealers, and others commission men. The major portion of the tonnage handled by our warehouse consists of inbound carload shipments of freight transported at carload rates, and that when we receive those cars and unload them, we then distribute the contents thereof in L. C. L. lots to the various customers of our patrons.

We have lost business to these concerns that receive the allowances that we complain of. Our normal warehouse [fol. 373] charges have been reduced by us in attempts to meet the competition of those warehouse companies that receive the allowances. There are certain classes of business customarily handled by cold storage warehouse companies that we have abandoned hope of obtaining and we have surrendered to these warehouse companies that receive the allowance.

The club-car traffic is one of such kinds of business. I will describe that club-car traffic of the cold storage warehouse. That car will arrive with, we will say, in the neighborhood of four to five hundred packages, all consigned to one consignee who will act as the agent. That agent will make distribution out of the contents. He will also collect the freight charges and pro-rate from these several owners who have the goods in the car. Now, during the extreme hot weather months, he may not take delivery immediately, and there are requests to take advantage of the 48 hour free storage under refrigeration.

Cross-examination.

By Mr. Glasgow:

We lose certain business to the other warehouses. We lose business to competitors who have no allowances from the railroads, also at times, namely, the Philadelphia Cold Storage and Warehouse Company, during the summer months and the Pennsylvania Safe Deposit during the winter months. Those are our competitors. We lose busi-

ness to them; I would not say that they sometimes lose business to us.

I would not say that we have such a condition that in competition we get a little advantage of it and gain some business from them. We never get any business from them in the competition. Due to this condition they always get it from us. We have some business for the reason, our [fol. 374] principal accounts, we waive that handling charge, because if we did not, we would have no business at all.

Suppose a shipment comes in, a car comes alongside of our platform; we unload it, and immediately it is taken out by wagon or truck. We do not get anything for it. If we did not unload it for nothing, we would not get any business at all to amount to anything.

We have three or four principal accounts that mean a whole lot, and we are willing to waive that handling charge rather than to lose it. We make enough money out of our storage charge to justify waiving the handling in the aggregate, at the end of a season.

By Mr. Woodcock:

Shipments moving into our warehouse are consigned in two forms. It is either John Smith in care of the Industrial Warehouse & Cold Storage Company or Industrial Cold Storage & Warehouse Company direct. The usual method is John Smith care of Industrial Cold Storage & Warehouse Company. We are not the owners of any of the commodities that move in by railroad. We pay the freight charges and then collect them back from the owner.

Even though some of the shipments may be consigned to the Industrial Cold Storage & Warehouse Company, those shipments would be owned by someone else. And as to the disposition which we would make of those shipments, that would be according to orders which we receive from the owner or from the other party with whom we had our dealings.

Our warehouse is thirteen city blocks from the warehouse of the Philadelphia Warehouse & Cold Storage Company. [fol. 375] It isn't a fact that our business is largely in a different section of the city from the business that they conduct. We bring our business from the producing dis-

trict, which is the same district that the other warehouses get their business from.

When we founded our business in 1905, personally, I did not know that the Philadelphia Warehousing & Cold Storage Company were performing certain services of which we complain, nor that they were receiving these allowances of which we complain.

Our business has grown just a trifle since 1905. I will qualify that a little more explicitly. We added on a couple new rooms to take care of about ten thousand additional cases of eggs. Outside of that we have not expanded any. At the present time in our warehouse we store eggs, poultry, butter, apples, dried fruits and other fruit besides dried fruit. Our rates for the storage of dried fruits are 17 cents per 100 pounds for the first month and 10 cents per 100 pounds for each additional month.

Our warehouse is not located on the Pennsylvania Railroad.

By Mr. Stilwell:

We are not exclusively a cold storage warehouse. I would say eighty per cent of our business is cold storage. The other twenty per cent that are not cold storage are dried fruits, canned goods, soaps—I would say those commodities are stored by all warehouses in Philadelphia generally.

Then we are in competition as to twenty per cent of that business with all the general warehouses in Philadelphia, so that when I stated on direct examination that I had two competitors only, as a matter of fact, I have competition with cold storage warehouses for eighty per cent of our business and of all other warehouses for twenty per cent of our business.

[fol. 376] I say two competitors for the reason that the Philadelphia Warehousing & Cold Storage, being on the same railroad tracks as the industrial, would be a competitor as far as cold storage was concerned and with the Pennsylvania they handling some of the commodities that we do during the winter months when they do not require cold storage, I would consider them a competitor of the company.

I limit our competitors to those who have similar railroad facilities, so far as the Philadelphia is concerned and

so far as the Pennsylvania Company is concerned, eliminating the railroad feature, they handling those particular commodities, we consider them a competitor as far as general warehousing is concerned. I would consider warehouse on other railroads a competitor but for that one reason. If the warehouse had a siding on the Pennsylvania Railroad it is a competitor of ours, due to this feature that I speak of, the handling. If it does not have any handling charge, it is a competitor of ours, in a sense, it is bound to be. It is true all the warehouses are competitors.

ROBERT BEATTY, JR., was thereupon called as a witness on behalf of the complainants and, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hickey:

My name is Robert Beatty, Jr. I am secretary and treasurer of the Industrial Cold Storage & Warehouse Company.

I am also the Philadelphia representative of the Milk [fol. 377] Products Sales Company. That is a concern engaged in the sale of manufactured milk products. It ships those products in carloads at carload rates to Philadelphia. Then they are re-distributed after arrival in Philadelphia almost entirely in L. C. L. lots. We use warehouse service in effecting that distribution.

The warehouse companies we patronize are: For general storage, the Merchants Warehouse Company; for cold storage, the Industrial Cold Storage & Warehouse Company. There are services arising from the handling of our products that we route to the Merchants Warehouse Company which cause us to prefer the service of that company. They are the free handling of our merchandise across their platform for delivery inside of the forty-eight hour period following arrival.

We can ship cars from our factories consigned in care of the Merchants Warehouse Company, to ourselves in care of the Merchants Warehouse Company, and if the goods are sold before arrival, send the orders to my customers

who have bought the goods, and have them go to the warehouse and pick these goods up inside the forty-eight hours free storage time, at no cost to ourselves—at no additional cost above the freight charges. That applies only to that portion of our business delivered within the 48 hours free time. As to why we send the other portions of our tonnage to the Merchants Warehouse Company, we do not want our stuff scattered around in a haphazard manner in a number of different warehouses.

The free handling service given by the Merchants Warehouse Company on that tonnage that is distributed within [fol. 378] the 48 hours of its arrival induces us to send all of our tonnage to the Merchants Warehouse Company whether it be distributed within that 48 hours or put in storage for a longer time.

Assuming the elimination of this free handling service at the Merchants Warehouse Company, we would possibly not send all of our tonnage for distribution through the warehouses of that company.

In the absence of free handling charge there are many other warehouse companies in Philadelphia that we would consider assigning our business to.

There is no possibility of those other warehouse companies receiving our business while this free handling service is granted by the Merchants Warehouse Company—not unless they gave a like service, that is, free of charge. That means free handling for 48 hours.

Cross-examination.

By Mr. Glasgow:

The Industrial Warehouse Company on shipments such as I speak of—milk—absorbs the handling charge when it goes into storage. We do not pay it to the Industrial either. The question of handling charge is of very decided importance, under certain circumstances, to us when the milk is going into storage, because the milk that we send to the Industrial Cold Storage & Warehouse Company requires refrigeration, and there is practically none of it which is immediately distributed over the platform. It goes into the Industrial Warehouse Company and we pay the storage and refrigeration charges, but we do not pay

the handling charge of loading and unloading and putting it into storage—not as such. We only pay a storage charge. That storage compares favorably with the storage [fol. 379] charge paid other warehouses or they could not keep the business. We get a favorable storage charge and refrigeration charge from the Industrial and do not pay any handling charges. I do not get a better or cheaper service through the Industrial than I do through the other.

Q. Well, then, what are you objecting to?
A. What am I objecting to?
Q. Yes.
A. Did I object to anything?
Q. Why, I thought you were protesting here about these charges or something.

Mr. Hickey: No; I do not understand he is. He is just a witness trading with the Merchants Warehouse Company that I have called to state the facts.

I say that I preferred the Merchants Warehouse Company on account of the free handling charge, because we get 48 hours free storage there. I do not handle anything but the perishable milk products at the Industrial. They are two different types. I handle condensed milk and powdered milk. I do not handle our condensed milk through the Merchants. We handle that at the Industrial. I do not pay any handling charge on that condensed milk. I do not get free handling charge in the way of 48 hours free storage at the Industrial because it is not required on that product. That product goes into storage as soon as it arrives. That is the condensed milk we are talking about. If I sent it to the Merchants Warehouse I would get the regular 48 hours free storage. I don't send it there because they don't have refrigeration. It is a question of [fol. 380] refrigeration on that particular item. I do not pay the handling charge on that traffic at any warehouse that I send it to.

I ship powdered milk to the Merchants Warehouse Company and if that milk is sold before arrival, and distribution is made within 48 hours of the time that the car is unloaded, there is no charge of any nature made.

I do not ship the powdered milk to the Industrial Warehouse Company. I do not know how much of that I ship. That is probably 60 per cent of our business.

By Mr. Woodcock:

I have never used the Philadelphia Warehousing and Cold Storage Company for the handling of this milk that requires refrigeration, due to my personal connection with the Industrial Cold Storage Company.

JOHN B. S. REX was thereupon called as a witness on behalf of the complainants and, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

My name is John B. S. Rex. I am president of Rex & Company, Incorporated, a complainant in this case. That company is engaged in the storing of merchandise at Philadelphia. It has been engaged in that business since 1892. Its general office and its warehouses are located at American and York Streets, Philadelphia. It operates eight warehouses. They are served by private sidetracks connecting with the Reading Railroad.

We receive the major portion of the tonnage of freight [fol. 381] that is tr-nsported inbound to our warehouses from the Reading Railroad. We receive most of our inbound tonnage over the Reading Company. Most of our outbound tonnage goes over the Reading Company. About 90 per cent of freight handled at our warehouses is transported by railroad.

It would not be possible to conduct our warehouse business if we handled only the ten per cent local business. I complain of allowances given by the Reading Railroad to the Pennsylvania Warehousing & Safe Deposit Company.

We have lost business because of the allowances or use of the allowances against us in the competitive solicitation of traffic.

We have been compelled to reduce our normal warehouse charges to meet that competition. There are certain classes of traffic that we find it hopeless to compete for in competition against that competing warehouse company. The approximate value of our warehouse facilities is about $500,000. The area of the storage and handling floor space at

our warehouses—the actual space taken up in storage is, roughly, somewhere between two hundred and two hundred fifty thousand square feet. We handle at our warehouses all kinds of general merchandise.

Cross-examination.

By Mr. Glasgow:

The larger part of our business probably is chiefly wool—very little cotton. A large part of our business comes in in import business. I should say 60 per cent, maybe more of it is import. That usually is handled on the rate governing import freight from dock to warehouse; not on a switching charge.

It may be a fact on rare occasions, but not frequently [fol. 382] that the import traffic or part of it is handled by trucks from the docks to our warehouse. It is handled on trucks that may come into a pier that is not a Reading siding. If it comes in where it is a Reading siding, it is put into the cars and sent up to us by the Reading Railroad. I think the rate is five cents a hundred on import freight from the wharf with a 2½ cents loading charge.

We pay that railroad five cents a hundred for bringing it up to our warehouse. I believe that is the rate, then when it goes out the freight rate is paid; we do not necessarily pay it. The customer pays it, I believe. There is a handling charge at our warehouse on the freight that comes up from the dock; that is, wool or whatever it may be. That charge varies according to the commodity. The customer pays it. I do not believe he does pay it at every other warehouse. I do not think he does. He tells me he does not.

I understand that there is free handling charge at the Pennsylvania Warehouse & Safe Deposit Company on wool that comes in import and is carried from the dock up to their warehouse. If that traffic comes in import and it is carried under the same rate of five cents to the Pennsylvania Warehouse & Safe Deposit Company, I do not think they charge for the handling of it.

I have never brought anything in or had anything billed to me personally. I am given to understand by my customers that the crux of the situation is if they put it with one of the warehouses they have no labor charge to pay, no handling charge. If they put it with me I have to charge

for my labor because I am not paid by the railroad for handling it, and the result is I have often the question [fol. 383] whether I will handle it for nothing or lose the business.

Q. Do you not know it is a fact, Mr. Rex, because you must have known that to be able to make the statement you did just now, that nobody gets an allowance in the Philadelphia warehouses for the handling of wool?

A. No, I did not know that.

Q. You did not know that?

A. No, sir.

Q. And if nobody got any allowance for the handling of wool, your objection that you filed here today would very largely disappear, would it not?

A. Well, there are wheels within wheels, where a railroad is paying a terminal charge to a warehouse that enables them to offer terms that an independent warehouse cannot compete with.

Q. You state here a large part of your business is wool?

A. Yes, sir; I did not say it all came in at the Port of Philadelphia either.

Q. Suppose it don't. If the large part of your business is wool and if there is no allowance paid by the railway company to any warehouse for the handling of wool would not a large part of your objection that you have stated here disappear?

A. No, sir.

Q. Why?

A. Because we cannot compete under the terms offered unless we get the same advantages of a tonnage charge that the other warehouse does we cannot compete.

[fol. 384] Q. Suppose none of them get it.

A. We cannot compete in loading it out.

Q. Suppose none of you get any payment for it?

A. If everybody gets the same? There would be no reason for us being here.

Q. That is what I say. So far as wool is concerned, if nobody got any allowance, then there would be no reason for you to be here on account of that, would there?

A. You see you are talking about it as if all the wool came from Philadelphia at 7½ cents a hundred, athough you said five. It may come from Arizona or New Mexico. A lot of it may come in through the Port of Boston or New York.

It may be rejected or reshipped from different points and when those wools come in on a full haul, there is an allowance made.

By Mr. Webber:

We do no cold storage business.

By Mr. Woodcock:

I said that 60 per cent of our business is wool. I could not tell you how much of that wool has come in through the Port of Philadelphia to be hauled to us from the piers of the railroads to our warehouses. I have never made a record of it. Sometimes it would be quite a good deal; sometimes it would be very little; different seasons different importers have different ways of shipping. If you take the total for the whole year I do not think the greater part of it comes into us through the Port of Philadelphia.

[fol. 385] Shipments moving into our warehoue are sometimes consigned to Rex & Company, Incorporated, generally consigned to the owner, care of Rex & Company siding. Where they are consigned to Rex & Company, Incorporated, they do not belong to us in any way; that is very rarely done, however. We have no interest in the goods other than the owners' interest whom we represent. The capacity of our warehouse has been increased since 1892, since the business was started. About four times—about four times as great.

The last building that we erected was the first year of the war or the year before the war.

By Mr. Glasgow:

Practically none of our wool business is delivered by truck to factories or mills in the immediate vicinity. Practically all of it at the present time is shipped out by rail.

Edward T. Davis, Jr., was thereupon called as a witness on behalf of the complainants and, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

I am Secretary and Treasurer of the Quaker City Cold Storage Company. That company is engaged in the cold

storage business with warehouses at Delaware and Spruce and Delaware and Snyder Avenues, Philadelphia. Its general offices are at 211 Callow-Hill.

The Pennsylvania Railroad siding serves our Delaware Avenue and Spruce Street warehouse—B. & O. Railroad serves Delaware Avenue and Snyder. That Delaware Avenue and Snyder location is a joint terminal—Reading and B. & O. Railroads.

The Quaker City Cold Storage Company receives allow- [fol. 386] ances from the Pennsylvania Railroad Company for unloading of cars. The rate of those allowances and the commodities are 50 cents a ton of 2,000 pounds on butter, eggs, cheese and poultry. The aggregate of the allowances received in any recent year is $1500.

Other commodities we receive in cars over the Pennsylvania Railroad and unload at this Delaware Avenue and Spruce Street plant are meat, fish, fruit, produce and canned goods. Those canned goods are cold packed fruit preserves.

We receive allowances from the Pennsylvania Railroad and those are for handling those four commodities at our Delaware Avenue and Spruce Street building.

We receive no allowances from the B. & O. and the Reading Company for handling those articles or any other articles at our Delaware Avenue and Snyder property.

That is Mr. Lang's signature on that letter from Mr. Lang, assistant treasurer of the Quaker City Cold Storage Company, addressed to the Milk Products Sales Company under date of June 13, 1928.

(Said document, so offered, was thereupon received in evidence, marked "Complainant's Exhibit No. 11, Witness Davis.")

Practically all of our business handled at our Delaware Avenue and Spruce Street property, which is served by the Pennsylvania Railroad, is inbound tonnage received over the Pennsylvania Railroad.

We have very little outbound business.

Taking a typical car of inbound freight from the time we receive an arrival notice from the Pennsylvania Railroad at Spruce Street, this is what we do with that freight: [fol. 387] The car is rolled into the plant and we are notified by the railroad company and we instruct them to place it

on our siding. We unload that car and receive the bill of lading of what is in the car and check it out. There are two kinds of cars. One is l. c. l. and the other is the straight car shipments. The straight car shipment will be called for or delivered. If it is called for within the 48 hours, why, we do not store it or make any storage charge for it. If it remains over the 48 hours, it goes under storage under lot number and we bill the consignee another charge.

If the goods are delivered within that 48 hours we take this allowance from the Pennsylvania Railroad Company as our compensation for the handling charge.

I would say generally and in practically every case those shipments are billed to the consignee in care of the Quaker City Cold Storage Company.

We distribute the inbound carload shipments; that is, distribute them in l. c. l. lots. We deliver them that way. In order to effect that distribution we receive from the owners of freight, by United States mail or other means orders, which instruct us as to the distribution the owner desires made. Those orders are, in some cases, in our possession at the time we break the seals of this car and start to unload it; I am not sure in all cases. In cases where they are not in our possession, we hold the contents of the car and we neither store it nor distribute it until the orders are received later.

The distribution service which I described applies to [fol. 388] butter, eggs, cheese and poultry. I believe it accurately reflects our handling of butter, eggs, cheese and poultry. It does not accurately reflect our handling of inbound shipments of meat, fish, fruit and canned goods. In some cases it is the same; in other cases it is different. For instance, in cars of fish, we do not hold any fish for 48 hour delivery, because they expect us to store it, and we always store that right away. Fish goes into cold storage immediately.

We receive allowances on inbound shipments of butter, eggs, cheese and poultry; we do not receive allowances on meats, fish, fruit, produce, canned goods and preserves. As to the reason why the Pennsylvania Railroad Company should pay allowances on those first four commodities and not pay allowances on the others—I cannot answer that except that they only granted us the allowance on the butter, eggs, cheese and poultry.

We handle butter, eggs, cheese and poultry at our Snyder Avenue warehouse served by the B. & O. and the Reading. The butter, eggs, cheese and poultry handled through that property at Delaware Avenue and Snyder is handled under practically the same circumstances and conditions that those four articles are handled through our Delaware Avenue and Spruce Street plant. We do not get any allowance from the B. & O. and the Reading; we have no terminal agreement with them. I do not know why we don't. It is a new plant just been operating for a few months.

Cross-examination.

By Mr. Glasgow:

At this B. & O. and Reading terminal, the railroad company unloads the cars. They handle the freight on the plat- [fol. 389] form. We handle it at this other warehouse but at the B. & O. and the Reading the railroad company handles it themselves.

By Mr. Bikle:

With respect to the arrangement we have with the Pennsylvania Railroad, I referred to the fact we were paid for the unloading of the freight. We have entered into a contract; that is the foundation. That payment includes other services than the unloading of the freight.

We have other duties to perform in regard to the collecting of the freight and so forth. We collect the freight from the consignee. Our company itself pays the freight charges on some of these shipments that come into our warehouse. We pay it for the account of the other people. We advance it and then bill it to them. There are no shipments that are handled through our warehouse where we pay the freight money out of our own treasury except to collect again; just simply advancing.

In respect to the handling of these shipments, we do exactly what we are told by the owners or their representatives. Goods delivered within 48 hours is a smaller but considerable part of the business.

When goods consigned, say, to A in a car are delivered to such persons as A directs within the 48 hours, in that case we receive no compensation of any kind for storage and

the compensation we do receive is such compensation as we receive from the railroad under our contract.

There is a substantial amount of freight, though, of a smaller quantity than the other that is so handled. There is freight that passes through our place of business from [fol. 390] the railroad to the person to whom the consignee tells us to give it that never gets warehouse service in the sense of storage. Some of the freight that is handled through our warehouse comes from points inside Pennsylvania.

Redirect examination.

By Mr. Hickey:

A small proportion of our inbound shipments originate at points in the State of Pennsylvania.

Most of the shipments handled at our warehouse originate, I would say, in the middle west—points outside the State of Pennsylvania.

Mr. Hickey: Yesterday, when Mr. Henry was on the stand, I endeavored to put in description of the Merchants' Warehouse Company appearing in a trade publication entitled "Distribution and Warehousing" and I did not have the correct copy of that. I now show that to Mr. Glasgow.

Mr. Glasgow: All right. Go ahead and put it in.

Mr. Hickey: I offer for identification an exhibit showing excerpt from "Distribution and Warehousing," issue of January, 1928.

Mr. Glasgow: Page what?

Mr. Hickey: At the present time I take it Mr. Glasgow and I have an understanding that page 430, Merchants' Warehouse Company, is propertly identified by that publication. The balance of that exhibit I will identify by witnesses called later.

Is there any objection to my offering the whole exhibit in evidence at the present time?

Mr. Glasgow: Let me see it. I do not think there is the slightest.

[fol. 391] Mr. Hickey: It is excerpts from that publication.

Mr. Glasgow: None in the world so far as I can see.

Mr. Hickey: Then I offer the exhibit in evidence.

Examiner Brown: The reporter will strike from the exhibit the heading "subsidized warehouses." Without objection this will be received as Complainant's Exhibit No. 12.

(Said document so offered, was received in evidence, marked Complainant's Exhibit No. 12, by Counsel.")

Mr. Hickey: Now, I would like to offer another exhibit in respect of the complainants' warehouses which appear in that same publication.

Examiner Brown: Any objection to the reception of Exhibit No. 13? I will be received as Complainant's Exhibit No. 13, by Counsel."

JAMES GALLAGHER was thereupon called as a witness on behalf of the complainants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

I conduct the Gallagher warehouse in Philadelphia under the name and style Gallagher warehouse. It is not incor- [fol. 392] porated. I have conducted a warehouse business in Philadelphia thirty years. My general office is located at 509 Third Street, Philadelphia. It is general merchandise warehoues business. About 70 per cent of the tonnage handled by our warehouses is transported by railroad inbound or outbound.

It would be impossible for us to pay operating expenses if we handled only the local tonnage not requiring railroad transportation.

The warehouses which we operate are at 708 to 714 South Delaware Avenue, Philadelphia; 736 to 748 South Swanson Street, Philadelphia; 810 to 820 South Swanson Street, Philadelphia. The value of our warehouse facilities is about $700,000. We handle general merchandise. We are obliged to give 48 hours free delivery in order to compete

with the subsidized warehouses; otherwise we would not be in business.

We handle all kinds of freight except inflammable and explosive articles. We do not handle bulk freight, it is package freight. The railroad companies that transport freight inbound to and outbound from our warehouses are Reading and the Pennsylvania Railroad; the Pennsylvania Railroad to two of those warehouses only.

I have complained of allowances for the last 20 years. I complain of the subsidized warehouse allowance and the tonnage proposition based upon 50 cents a ton, which we have complained of to the officials of the railroad companies at times. The railroads that give allowances and the warehouse companies that receive those allowances are the Pennsylvania Railroad, Reading Railroad, Baltimore & Ohio Railroad; Merchants' Warehouse, against the allowance from the Pennsylvania Railroad, and the Pennsyl- [fol. 393] vania Warehouse & Safe Deposit Company that of the B. & O. and the Reading Railroad.

There are many ways by which those allowances hurt us in the conduct of our business. Of course, we are obliged to reduce the rates about one-third of what we formerly got and it has come down to a minimum such today that warehouses practically pay—my warehouses pay about 2-1/2%.

We have various people at various cities around who solicit freight which we advertise and they come in competition and we have lost considerable business, they said, because we do not give the allowance and we were obliged then to make allowance to certain people who ship to us. We were obliged to reduce our charges and give them 48 hours free delivery in all carload freight coming into the warehouse. The Merchant's Warehouse and the Pennsylvania Warehouse give it. Those two warehouse companies are our competitors.

In the competitive solicitation of business, that 48 hours free time is hurtful to us, because we have to unload the freight and put it into the warehouse and keep it there and make distribution of those goods possibly in small lots to people who come there for them and take receipts.

On our inbound freight distributed within 48 hours if we met that competition we don't derive any revenues from

the handling of that freight, and if we meet the competition of the free handling service by our competitors, the Merchants' Warehouse Company and the Pennsylvania Warehousing & Safe Deposit Company, we have to perform [fol. 394] services free of charge.

Cross-examination.

By Mr. Bikle:

In cases where freight is shipped to us we pick it up and put in in the warehouse. We do not know anything about it other than it is shipped to the railroad company. The railroad company notifies us and we pick up the freight of that calibre and take it in the freight warehouse and then distribute it from the warehouse. In other words, we have such accounts that we handle it exclusively for out-of-town people. We make out the bills and do the collecting and everything else for them and then submit to them. We also have a list of names, who to let have that merchandise. The actual way in which about 30 per cent of the goods are consigned when they come to our warehouse is they are consigned to Gallagher's warehouse. The other is consigned to somebody in our care. We advance the freight moneys for the accounts of the owners.

We receive freight from points inside of Pennsylvania.

By Mr. Webber:

I imagine about 30 per cent of that freight that comes into our warehouse is distributed within 48 hours.

Q. I do not know that I understood you exactly as to what extent you were hurt, as you said you were. As I understood you, you said that you only got about one-third of what you formerly got for storage. Do you mean in amount of money?

A. No. One-third in the amount we formerly got. The rates have been cut. They are practically handling freight today for 2 1/2 and 1 1/2 that we did, and Mr. Earl, who is here now, said he hoped those rates would never go lower. [fol. 395] Q. How long had this cutting of rates continued by you?

A. By me?

Q. Yes.

A. I did not particular- cut before. I had to cut to meet the other fellow.

Q. You did cut them?

A. Absolutely.

Q. When?

A. In the last four or five years.

Q. How much did you cut the last year, for example, on the average?

A. It got right down to a minimum right away. It seemed to me when they started to cut they cut it all together. They cut it down until we got down to about five cents a hundred, three cents a hundred, and came down to about two and one-half cents and one and one-half cents a hundred. Of course, we were practically forced into the warehouse business. If we had not this trucking business of ours, we could not exist in the warehouse business today. The warehouse would not permit us to go ahead if we had not this big trucking business in Philadelphia.

Redirect examination.

By Mr. Hickey:

Our business is mostly to and from points outside of the State of Pennsylvania.

R. P. PURCHASE was called as a witness on behalf of complainants and, after having been first duly sworn, testified as follows:

[fol. 396] Direct examination.

By Mr. Hickey:

My name is Roy P. Purchase. I am engaged in the flour business in the Bourse Building, Philadelphia. I represent the Commander Larrabee interests. They are flour millers in Minnesota, Kansas and Missouri, operating mills with a total capacity of approximately 30,000 barrels a day. Commander Larrabee mills market their flour, principally east of the Rocky Mountains.

As to the quantity of that flour sold and distributed in Philadelphia, proportionately with the requirements of the market, we obtain our share of the business.

I have salesmen traveling around the City of Philadelphia and also traveling out in the state who sell flour principally in carload lots for shipping into the territory there.

I am a member of the Bourse, Member of the Philadelphia Commercial Exchange and the Philadelphia Flour Club. The Philadelphia Flour Club is affiliated with and part of the National Federated Flour Clubs.

Of the several warehouse companies in Philadelphia, the Commander Larrabee interests market their flour principally through two, the Merchants Warehouse Company and the Pennsylvania Warehousing & Safe Deposit Company. The handling of our flour is confined to those two warehouse companies, principally due to concessions or rates that are afforded through those warehouses as compared with other warehouses.

I will describe those concessions in detail: Flour arriving for delivery through the Merchants or Pennsylvania Ware- [fol. 397] housing & Safe Deposit Company warehouses in the first place avoids any possibility of demurrage as a result of the cars being unloaded immediately upon arrival as compared with it being held on track for the other warehouses if bills of lading are not surrendered. Beyond this 48 hours' free time granted through the two mentioned warehouses the Mechants and the Pennsylvania, it is my understanding that there is subsidized——

Mr. Glasgow (interposing): Wait a moment. I think the witness better confine himself to facts.

Examiner Brown: Testify as to facts, please, sir.

The Witness: The two mentioned warehouses make lower rates for handling of flour than the balance of the warehouses in Philadelphia have been able to quote us.

As to whether there is an alleged agency practice here, that is, that the Merchants Warehouse Company is alleged to be the agent of the Pennsylvania Railroad Company and that the Pennsylvania Warehousing & Safe Deposit Company is alleged to be the agent of the Reading Company, that operates in a manner detrimental to milling interests, including the Commander Larrabee interests, it is my understanding that these warehouses are the agents of the

railroad. As to what practice is involved in that alleged agency that is objectionable to the Commander Larrabee interests, the principal objection of our mills is the fact that through the association of one man acting as railroad agent, warehouse manager and banker, it reacts to the disadvantage of our mills principally due to the fact that our [fol. 398] items that are sent through on arrival draft and our goods which are sold on arrival draft basis are not paid for in some cases for five or six months, which means an investment on the part of the milling companies that should not be necessary and would not be necessary if delivery was handled the same as it is through the ordinary warehouse throughout the country and delivery taken within 48 hours.

(Upon motion of Mr. Bikle and Mr. Glasgow to strike out the last answer as not responsive and as irrelevant to any issue in the case, the Examiner ruled the answer will stand subject to those objections.)

By Mr. Hickey:

Q. Mr. Purchase, state more in detail why this commingling of transportation service and trade service is objectionable?

(Objection and argument of counsel fol-owed by ruling of the Examiner: "The witness may answer the question which Mr. Hickey has asked, the answer to be subject to the objections of Mr. Bikle and Mr. Glasgow. I will not attempt to rule out any evidence of this kind because it may have a bearing on the case. You can rest assured that the Commission's report and order in this case will not go beyond the issues covered by the complaints. Any testimony from this witness along that particular line will be received subject to the objection and subject to the remarks of counsel for both complainants and defendants.")

The Witness: This practice is objected to due to the fact that millers who ship their carloads of flour to Philadelphia [fol. 399] on shipper's order bills of lading, and who deposit these items in the bank to be collected upon arrival of car find that these cars are unloaded in the Merchants and Pennsylvania warehouses without surrender of bill of lading and in numerous cases will stay there for several

months before the draft is paid, and in some cases it results in the drafts never being paid, and the market declines.

The Pennsylvania Warehousing & Safe Deposit Company operate a bank in connection with the warehouse and advances money for a proportion of the draft, I would say approximately 80 per cent, when the buyer gets ready to come in and pay for an individual car. The car may have been there 30 or 60 or 90 days, and the customer when he gets ready to take delivery of one car, maybe several he might have, goes to the warehouse company and he can arrange a loan from the warehouse company for approximately 80 per cent of the value of the car by depositing himself about 20 per cent and giving a note and conveying title to the property to the warehouse company.

I believe the Merchants Warehouse Company has banking affiliations indirectly, or an arrangement with some banking concern for a similar handling.

It is my understanding that if those warehouse companies were treated as separate and distinct entities, then when the railroad company tendered an order notify shipment of flour for delivery at those warehouses, the order notify bill of lading would have to be taken up as a condi- [fol. 400] tion precedent to delivery and that would require payment of the draft attached thereto at the bank, and that is the only point in which we are interested. Under the present conditions there is considerable delay in taking up those bills of lading; sometimes it runs into several months.

The warehouse company is in the storage business and derives revenue from long term storage of flour. Ordinarily the trade buys in carload lots. Some of the smaller fellows buy a great many cars at one time in certain markets and order it forwarded to the warehouse companies and immediately upon arrival of the goods at the warehouse they are unloaded and following unloading there is a postal card notice sent out to the notify party who, at his convenience, whether one week or one day or six months, goes to the warehouse company when he wishes to get that one particular car and ordinarily arranges to handle it through the finances of the warehouse company, putting up approxi-

mately 15 or 20 per cent of his own funds. That puts it in a position where he can—where the draft is then paid to the mill either direct by the warehouse company bank or through whatever bank they might have arrived, and when the customer wishes to withdraw any of the goods from that car he then must pay the balance of the original purchase price per barrel. As to whether the practice of handling flour through those two warehouse companies is similar to the practice of handling flour through the warehouses at Buffalo, or Detroit or Cleveland or Cincinnati, I do not know of any place in the United States where they handle flour the way they do in Philadelphia.

[fol. 401] Bankers with whom I handled this type of business at Minneapolis when I was in business there myself looked with great disfavor upon what are termed cash items on shipments destined to Philadelphia. I might say cash items are shipper's order bills of lading which are accepted by the banks and for which immediate cash credit is given, so that it can be checked against immediately. This particularly was mentioned to me several times in taking large quantities of drafts where they would sort out the Philadelphia items for more definite observation as to the contents.

Cross-examination.

By Mr. Glasgow:

If it be supposed we did not have this arrangement in Philadelphia by which a car of flour as soon as it arrives at our mills was unloaded at a warehouse and if it be further supposed the car arrived on one of these bills of lading with draft attached and the fellow did not pay it, we would immediately get notice at Minneapolis or from the point of shipment and we would immediately proceed to get after him and get it collected or we would suffer a loss as a result of it being declined and it would teach us a lesson and we would stop selling him. The car would go on demurrage. We would have to pay, too, if that fellow did not care to take it. If we ship to people here who are prompt in paying their bills when the drafts are presented, then we do not have any of the difficulties mentioned; that is [fol. 402] what we do principally now. There are but few

of those who pay their drafts promptly upon the arrival of the goods, due to the fact that even the good ones have degenerated to this basis. There is very little available trade among the larger consumption in Philadelphia upon which the terms as mentioned by Mr. Glasgow would be enforceable. I mean that the people who buy flour in Philadelphia have degenerated to the point that they will not pay their bills when the cars of flour arrive, which is when they are due. As to whether our complaint is a general one against the people we sell flour to, our complaint is against a policy or practice that has been developed by the warehouses and railroads. As to whether our complaint is that the railroads take it or put it in storage instead of collecting the bill, our complaint is that they unload it without getting the bill of lading. As to whether the railroads' complaint against us is that we ship it to people that do not pay their bills when they are due, our complaint is that they do not do in Philadelphia as they do in the rest of the United States in connection with handling particular shipments. I might qualify that by saying that some of our best customers who formerly were paying our arrival drafts discovered they could come in under this, and have got back to the basis of paying us the same as the rest of them, because they found there was a weak spot in the warehouse proposition. Our complaint, then, is a complaint as to the degeneracy of the flour trade in Philadelphia, if you wish to put it that way.

[fol. 403] By Mr. Bikle:

I think this agency relation ought to be discontinued and the railroad discontinue these payments to the warehouses.

As to the situation that would develop if this arrangement were not in effect, and as to whether it is correct to say that we would ship the car to Philadelphia and if the bills of lading were not delivered the car would stand on the track under demurrage and the consignee or notify party would suffer, he would suffer if it was finally delivered; we would suffer if he did not take delivery at any time. That would be a more satisfactory and a more attractive situation than the one which I have described. I am basing that opinion on shipments I have made throughout the United States while located in the west and the

very satisfactory results obtained from it. I would not say it is true that it is entirely within our province to ship flour to Philadelphia in that fashion if we so desire. The only alternative I feel we would have would be to discontinue selling flour in Philadelphia if we enforce those rules. I suppose we possibly could ship flour there for track delivery, just like any other terminal. As to whether it is simply that the trade would not like it as well, it is simply that the trade have facilities and they specify on their contracts where we must ship it, and that is destined to points where they can obtain the greater benefit in concessions. We could not obtain any orders if we made delivery of our shipments only on track.

[fol. 404] By Mr. Glasgow:

The larger part of the flour business in Philadelphia, I would estimate possibly 85 or 90 per cent of it, goes through the Merchants Warehouse Company and this other warehouse company, the Pennsylvania Warehousing & Storage Company. As to whether it is my idea that the trade of Philadelphia should be cut off from the concessions that the railroad makes in the handling of the delivery of this freight, that that should be cut off in Philadelphia and that the dealers there and the purchasers there should be required to pay the 40 cents or 50 cents a ton that is required to make delivery, I have never endeavored to pass on that. As I stated to start with the only object we have in the matter is the obtaining of the delivery on the bill of lading at an early date. As far as going on the record as to what compensation the railroad should or should not have, it has not been vitally important. It would help solve our difficulty if this provision by which the railway company paid for the unloading or loading of flour, and the handling of the flour, should be cut off. The result would be that the consignee of the car or the man who shipped it would have to pay the handling charge himself. It is my idea then, that on 80 or 90 per cent of the flour in Philadelphia the people who are dealers or the people who are the shippers ought to pay say 40 or 50 cents a ton for handling.

[fol. 405] By Mr. Stilwell:

As to whether it is correct that when this flour comes in and our customer allows it to go in storage after getting his

notification order without paying the draft and lifting the flour it is stored in the warehouse—it automatically is in the warehouse before the customer knows it is in town. The man that owns the bill of lading owns that flour; the mill company owns the bill of lading. While that flour is in the warehouse waiting for these delinquent customers of ours we own the flour.

As to why we do not get after our customer and make him pay, there is no one mill that can take an arbitrary stand where there are practices built up by the carriers that are afforded to certain individuals and we can not do any different than any other one mill might do. We have been and we are now shipping flour to points where there are warehouses, Harrisburg, Baltimore, Scranton, Wilkes-Barre, and none of that flour is unloaded before the bill of lading is surrendered, and the comparison of payment is so much different that we realize we can not bring the trade around to the point where they will pay our items on arrival of cars when our competitors are selling in a manner more lenient. We are willing to take a chance of paying the demurrage up in the state. We do not instruct our flour dealers not to put the flour in the warehouse because the practice there would bar us from participating in the volume of business going on in Philadelphia. In other words, if we attempted to get from the customers more prompt [fol. 406] payment, our competitors in the flour business would get the business.

The only difference between the practice of the Pennsylvania Warehousing & Safe Deposit Company in loaning upon merchandise in its warehouse from that of the National Bank or any other banking institution is that the former have actual commodity in their immediate possession rather than to have to take a chance on any documents not being correct that might be passed between the banks—that is practically the only difference.

By Mr. Glasgow:

I am in Philadelphia and I am the representative there of the Commander Larrabee Mills and of course I know when shipments are made at Philadelphia to parties to whom I have sold the flour. I am advised when that flour is shipped; we get a duplicate invoice.

We handled, I think Mr. Richardson stated a year ago, over 4,000 cars in there and we do not trace every one of those cars in detail.

By Mr. Stilwell:

Q. Suppose one of these shipments went into another warehouse, the Terminal Warehouse, for instance, and there was an order notify shipper bill of lading, would not the same situation arise in connection with that shipment as one to the Merchants or the Pennsylvania Warehousing & Safe Deposit Company?

A. In what respect?

Q. One of your customers directs that you ship care of the Terminal Warehouse?

A. Yes, sir.

Q. And the shipment arrives in Philadelphia, the cus-[fol. 407] tomer is notified but does not pay the draft and lift the bill of lading, what happens to the shipment?

A. It goes on demurrage.

Q. You mean it stays in the car?

A. Yes. That is my understanding.

[fol. 408] Edward Knighton was called as a witness on behalf of the complainants and, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

My name is Edward Knighton. I am engaged in the flour business in the Bourse Building, Philadelphia. The trade organizations and commercial organizations in Philadelphia with which I am connected are the Flour Club, the Commercial Exchange, the Bourse.

My company is the Philadelphia, Pennsylvania, and Maryland representative of eight or nine western mills. We sell flour both to Philadelphia customers and others in the territory we cover on arrival draft terms only.

[fol. 409] I heard the testimony of Mr. Purchase. As to whether I have a similar objection to the alleged agency between the Pennsylvania Railroad Company and the Mer-

chants Warehouse Company and Reading Company and the Pennsylvania Warehousing & Safe Deposit Company that Mr. Purchase voiced in his testimony, my objection is that there is no penalty attached to a man not paying the draft because it automatically goes into storage where he intended it to go in the first place. My position does not differ on the whole from that of Mr. Purchase, only possibly in some of his answers. As regards there being no way of making these people pay their drafts promptly, I agree with the answers Mr. Purchase made on cross-examination, and his statement that that is due to the system of storing flour without delivery of the bill of lading.

Cross-examination.

By Mr. Glasgow:

If there was coupled to the present arrangement a provision for penalty in case our customers did not pay their drafts promptly, I would have no objection to it. I think it would be a rather good arrangement if they had that penalty clause provided.

[fol. 410] SIDNEY ANDERSON was called as a witness on behalf of the complainants and, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

No name is Sidney Anderson. I am president of Millers National Federation. We have headquarters in Chicago and an office in Washington. That organization has something over 300 members operating somewhat over 300 mills. Its members produce about 73,000,000 barrels of flour a year; about 65 per cent of the total. That flour is marketed all over the United States—some of it in Philadelphia.

[fol. 411] I heard some but not all of the testimony of Mr. Purchase. I have an objection to this alleged agency between the Pennsylvania Railroad Company and the Merchants Warehouse Company at Philadelphia and between the Reading Company and the Pennsylvania Warehousing

& Safe Deposit Company at Philadelphia. The objection, as I see it, on the part of the millers of the United States to this particular arrangement is that it deprives them of the benefit of the law, the rules and the charges made by the railway companies for their own protection and with the object of securing a prompt unloading of freight. Second, that it, in effect, makes the goods shipped in the manner described by Mr. Knighton and Mr. Purchase subject to delivery to an agency of the railway company with which we have no privity of contract under the bill of lading or otherwise.

Cross-examination.

By Mr. Bikle:

I think that the proper course would be to discontinue the agency relation between the railroad and the warehouse company and discontinue the payment of this compensation for the unloading and other services.

By Mr. Glasgow:

I do not put that either on our mills or on the customer who receives it; I do not mean to put it anywhere. I think the rules and regulations and laws under which it is shipped put it there and that this arrangement places it elsewhere. [fol. 412] I mean you have certain rules respecting the application of the demurrage, for example. You have certain charges for storage in a railway warehouse. A shipment which goes anywhere else in the United States except to Philadelphia is shipped subject to those rules and regulations and charges, but a shipment going to Philadelphia is not subject to the same rules and requirements which make for prompt unloading of the car. It is perhaps true this arrangement in Philadelphia promoted the prompt unloading of the car as soon as it arrived, but it does not result in the lifting of the draft which is a part of the general transaction. Our objection is not to the want of promptness in paying our drafts. We make a contract with the buyer which is predicated upon the rules of the railroad companies in respect to the unloading of that car. I mean the rules with reference to demurrage and storage, etc. Their rules for demurrage are in effect in Philadelphia but not so far as these particular warehouses are concerned.

I don't know whether the car goes on demurrage if it is not unloaded in Philadelphia for any reason for which the railroad is not responsible.

Q. How can you answer when you refer to these rules of [fol. 413] demurrage without knowing.

A. I say these rules as they are applicable everywhere in the United States except in Philadelphia have the effect of——

Q. Now, what——

A. I am talking about demurrage. If you want me to answer your question I will. If you do not I will not.

By Mr. Glasgow:

Q. Mr. Anderson, I would like for you to tell me what rules it is that you object to of the railway companies that are not carried out in Philadelphia?

A. I am trying to tell you what the situation is. I can not testify with reference to the rules because I know nothing about the rules. I make no claim to know anything about them.

Q. Didn't you say your objection was that the rules, laws and regulations that were applicable all over the United States were not carried out in Philadelphia?

A. I said the effect of this arrangement between the railway company and these warehouse companies was to deprive us of the advantage of the rules which are made by the railroad companies to secure the prompt unloading of cars and it, incidentally, results in delay in the payment of the draft or papers which accompany the bill of lading.

Q. What rules do you refer to of the railroad company?

A. I refer to the rules with reference to demurrage, the charges for storage.

Q. Don't they enforce the rules for demurrage and the charges for storage after the free time in Philadelphia just as they do anywhere else?

A. They may for all I know. I can not testify as to that. [fol. 414] It is the effect of that.

Redirect examination.

By Mr. Hickey:

If any one member of our association desires prompt surrender of the bill of lading which carries with it payment

of the sight draft, he cannot arrange to compel that course of action in Philadelphia. He can not do it as a matter of competition. No one mill in any territory, Philadelphia or any other, can require any different or other terms from the customer than other mills are affording that customer. Consequently, the only way that you could get around the situation from the point of view of the mill would be by an arrangement which would practically be an agreement, concert of action among mills, which would probably be a violation of the entire anti-trust act, I suspect.

Recross examination.

By Mr. Glasgow:

I mean concerted action among all the mills that they would not deliver it until the bills were paid might be in contravention of the Sherman Act.

Ernest V. D. Sullivan was called as a witness on behalf of the complainants and, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

My name is Ernest V. D. Sullivan. I am employed by the Terminal Warehouse Company as Vice-President and General Manager. I have been in the service of the Terminal Warehouse Company ten years. My duties in that employment are: general supervision over sales and opera-
[fol. 415] tions. By sales I mean the selling of our service, that is, I have charge of the solicitation of business.

The Terminal Warehouse Company is incorporated in Pennsylvania. It is engaged in the warehouse business, and more especially the merchandise warehouse business, which involves assembling and shipping carloads and less carloads of freight by railroad outbound from Philadelphia, and receiving and distributing inbound carloads of freight at Philadelphia from practically every state in the Union. By carload freight I mean freight transported by railroad at carload rates. The general offices of the Terminal Ware-

house Company are located at Beach Street and Fairmount Avenue in Philadelphia.

Our company has been in the warehouse business in Philadelphia since 1904, same being originally operated under the name of the Terminal Warehouse and Transfer Company, its corporate name being changed in 1924 to the Terminal Warehouse Company.

We operate nine warehouses and three piers in Philadelphia which are used for storage purposes. Those are listed in one of the exhibits, from "Distribution and Warehousing," that was submitted this morning.

I have assembled some statements and reproductions of printed and written data in shape suitable for me to offer in evidence as exhibits.

My exhibits 14 to 17 are advertising matter put out in the regular course of business by the Terminal Warehouse Company, and exhibits 19 to 29 are letters taken from the files of the Terminal Warehouse Company. I have the original letters with me.

Exhibit 30 is my own production.

[fol. 416] The aggregate of the floor space of the Terminal Warehouse Company for storage and handling of freight is 1,377,540 square feet. The Terminal Warehouse Company has continuously, for more than twenty years, received inbound freight at its warehouses and shipped outbound freight from its warehouse via the lines of the following carriers: The Pennsylvania Railroad; The Reading Company; The Baltimore & Ohio Railroad; The Southern Steamship Company; The Philadelphia & Norfolk Steamship Company; The Luckenbach Steamship Company; The American Railway Express; The Merchants and Miners Transportation Company; and various other coastwise steamship lines and motor truck companies. About 95 per cent of our inbound tonnage is transported by the Pennsylvania Railroad, the Reading Company and the B. & O. Railroad.

I will describe our warehouse facilities and then explain our means of access to each of the transportation agencies named:

Four of the warehouses and three piers previously referred to, i. e., "Spring Garden Street Stores," "Fairmount Stores," "Brown Street Stores," "Sales Building," and Piers 31, 35-1/2 and 36 North Wharves, have private side

tracks with direct track connections with the lines of the Reading Company and the Pennsylvania Railroad. We also receive freight at these plants from the Baltimore & Ohio Railroad through the medium of the Reading Company. The warehouse referred to as "25th Street Stores" has direct track connections only with the lines of the Baltimore & Ohio Railroad; and the warehouse referred to as "12th Street Stores" has direct track connections only with the lines of the Reading Company. I shall describe briefly the facilities of Brown Street Stores, which will indicate the character of our shipping facilities. This building is of [fol. 417] modern construction, reinforced concrete, with a floor load capacity of 250 pounds per square foot. It occupies a plot of ground 103 feet wide by 311 feet long, and comprises eight stories and basement, with a total floor area of approximately 275,000 square feet. Two private side tracks run the entire length of the building on the inside, and one track on the outside, giving us a capacity of spotting twenty carloads at one time. A platform adjoins these tracks, running the entire length and width of the building, for the expeditious handling of freight, to and from cars, to storage on the upper floors, or to trucks for city delivery. There is a depressed driveway running the length of the building enabling trucks to back in and load under cover. Modern labor-saving devices have been installed in this building, including high-speed elevators of 10,000 pound capacity, hoists and electric conveyors, sprinkler equipment, etc.

The aggregate value of the facilities which we operate as warehouses is approximately five million dollars.

We have the usual corporate offices, stock clerks, accounting clerks, reporting clerks, correspondence clerks, trade solicitors—both local and out-of-town, checkers, superintendents, traffic experts, and other employes engaged in the physical handling of freight in our warehouses and to and from railroad cars and trucks. We also have an extensive trucking department, for the operation of which we employ drivers, loaders and dispatchers.

I will describe the business activities of the Terminal Warehouse Company in detail, indicating what business [fol. 418] we do; how we solicit and, when we get business, what we do with it, that is, what services we render:

Merchandise warehouses are today a very necessary link in the chain of distribution by reason of the absolute necessity for economy and service in placing merchandise in the channels of consumption. The period of deflation which followed the recent world war necessitated complete change in merchandising methods, as buyers today are not lured into quantity buying by attractive discounts, but are regulating their purchases by what is called the "hand-to-mouth" basis. To meet this condition the out-of-town manufacturer found that he must establish spot stocks of his products at strategical distributing centers. The expense of establishing his own private warehouse, with its trained personnel, fixed rental, cartage costs—necessitated by his inability to secure warehouse facilities with trackage to meet his particular requirements, light, heat, taxes, etc., which must be borne in their entirety in a private warehouse, he quickly ascertained was prohibitive. The public distribution warehouse, with its total elimination of fixed charges, its trained personnel, its perfected facilities, solved the problem for the manufacturer, as he only pays proportionately for whatever his requirements necessitate.

Nearly every manufacturer in the United States is a prospective user of warehouse space, particularly when it is borne in mind that, in addition to warehouse operation economies effected by the use of public distribution warehouses, there are also savings in freight charges by the spread between the carload and the less-carload freight rates. We, as well as other merchandise warehousemen, [fol. 419] induce the manufacturer to ship his products in carload lots to us, and thereby obtain the application of the lower carload rates. The savings in transportation charges thus effected are frequently sufficient to pay all our warehousing and distribution charges. Another influencing factor is the time saving in the carload movement by railroad as compared to the less-carload movement, plus the fact that the possibility of damage to the shipment is minimized by the elimination of frequent handling at transfer points that is necessary in the transportation by railroad of less-carload lots. The manufacturer or owner of the goods, by this saving in transportation charges, is thus able to avail himself of the valuable trade services performed by the public merchandise warehouses without greatly increasing his distribution cost. In the absence of this warehouse distribution service,

the manufacturer, wholesaler or owner of the goods would be compelled to pay the higher l. c. l. rates to obtain the distribution of his goods in small lots, which I shall describe:—For instance, one of our customers is Colgate & Company, soap manufacturers, whose plant is located at Jersey City, New Jersey, who ship their various products to us in carload lots at carload rates by railroad. They mail us a manifest which indicates the contents of the car, both as to count and product. This manifest is turned over to our Traffic Department, who immediately traces the movement of the cars with the railroad to expedite delivery if possible. Disposition instructions on all or part of the contents of the car are also received by us from Colgate & Company prior to the arrival of the car. That portion of the carload which is not delivered in l. c. l. lots immediately upon arrival of the car is placed in storage awaiting future [fol. 420] withdrawal orders, which are usually given to us by the local sales representative of the manufacturer. We deliver this soap locally and to nearby suburban points, and some is shipped by railroad or motor truck in less-carload lots to points in New Jersey, Pennsylvania and Delaware. This manufacturer will keep shipping his soap to us in carload lots at carload rates throughout the year, always keeping sufficient stock on hand to meet the immediate needs of customers in this territory, and thus be able to compete with soap manufacturers whose plants are located in Philadelphia. Another illustration is that of the Ypsilanti Reed Furniture Company, Ionia, Michigan, manufacturers of Reed Furniture. This concern formerly shipped into this territory in l. c. l. lots, with the consequent delays in shipment, damages, and high transportation charges. When the advantages of spot stocks were pointed out to them, making it possible to effect immediate deliveries of their orders, plus the fact that there was a saving of $2.73 per hundred pounds in the spread between carload and less-carload rates, which practically paid their warehousing and distribution costs, they immediately consummated arrangements with us to handle their entire distribution problems in Philadelphia. This involves the services of unloading cars, storing contents of same in the warehouse according to grade, color, kind, etc., mailing checking report of the outturn of the car, paying freight charges, reshipping, making out bills of lading, tagging, furnishing daily reports

of withdrawals from stock, indicating to whom deliveries are made, and a monthly inventory showing all receipts and deliveries. Their ability to make immediate delivery of all [fol. 421] orders has resulted in a considerable increase in their sales. Another advantage is secured by this manufacturer in that, their products being seasonal in demand, they are able to equalize their production throughout the year by shipping all their overflow production to the warehouse, thereby also eliminating a large investment in reserve storage space at the plant. If desired, we also issue Negotiable Warehouse Receipts which are readily hypothecated at their bank; and in some instances we (the warehouse company) make advances to manufacturers on merchandise stored in our warehouses.

The Furniture Manufacturers Association of Grand Rapids ship us pool cars for distribution to the Philadelphia trade. This Association is composed of a group of furniture manufacturers located at Grand Rapids, who feel that by consolidating their less-carload shipments for Philadelphia into pool cars they can provide a saving in freight charges for the Philadelphia trade, and also give them a better and quicker service on their shipments. These manufacturers haul their less-than-carload shipments to one common loading point, where the consignments are loaded into cars. The Association ships these cars to themselves in our care, sending us a detailed manifest advising us as to just what is in the car. They also send up the bill of lading covering the car and, while the car is in transit, we check the time, knowing when it should arrive, and in the event of any delay we take the matter up with the railroad to assure prompt delivery. These cars move "Freight Collect," and of course we pay the carload freight to the railroad. The car is then spotted in one of our buildings where it is unloaded, the consignments properly sorted out, and in- [fol. 422] voices prepared for the various customers having consignments in this car, billing them the carload freight charges on a pro rata basis. Many of the consignments are then delivered by our trucks, and the consignees who elect to call at the warehouse for their merchandise are notified by an arrival notice showing the amount of freight and distribution charges they are to pay us when they call at the warehouse. We of course provide the railroad with a detailed outcheck of the car, also advising the Furniture

Manufacturers Association regarding contents of the car and its condition; and in the event of any damage we secure proper notation from the railroad and advise the Association of this. Shipping in carloads, as the Furniture Manufacturers Association do, saves the Philadelphia trade a considerable amount in freight charges. For example, the mixed carload rate on China Cabinets from Grand Rapids is $1.12 per hundred, and the less-than-carload rate on this commodity is $1.93 per hundred. Also, the carload movement from Grand Rapids is much faster than the less-than-carload movement, and the Philadelphia trade appreciate the saving in time that is effected.

Another account with whom we do business is the Chambers Manufacturing Company of Shelbyville, Indiana. This company ships us carloads of Gas Ranges to be stored for the convenience of their trade, and for the purpose of being able to handle their business on a cash basis. They sell their Ranges for cash, and have issued instructions to us as to how much cash we are able to collect for the various model Ranges when they are delivered. Their carloads are shipped to the Chambers Manufacturing Company, c/o [fol. 423] Terminal Warehouse Company, and upon their arrival we unload and carefully check the contents, advising the Chambers Manufacturing Company of the outcheck, and also giving the railroad a detailed report on the car. Any evidence of damage is properly called to the attention of the railroad and proper notation secured. Also, as deliveries are made to various dealers, notification is immediately sent to the Chambers Manufacturing Company, along with our check covering the amount of the collections. At the end of each month we provide these people with a detailed inventory of stock on hand.

For two other customers we practically provide a branch office service, with the exception of rendering invoices. These are the Pepsodent Company and the Wander Company, both of Chicago. They ship carloads of their products to themselves in our care and, when they are received, they are handled in the same manner as the Chambers Manufacturing Company's cars as to unloading and checking of contents, and of course report is made to the railroad and to the customer in the usual way. These people then send us orders to be delivered to the Philadelphia trade by our trucks, to be called for at the warehouse by their

customers, or to be reshipped to out-of-town customers by railroad freight, express, boat lines or parcel post. Both of these customers have furnished us with credit lists containing the names of customers in this territory with good credit ratings, and have authorized us to accept orders received direct from those dealers. They in turn notify their dealers that they can order from the Terminal Warehouse Company as their requirements necessitate, and such orders are honored by us as presented, after we have referred to [fol. 424] the credit lists to ascertain if the dealer is properly authorized to order this stock. We provide both of these customers with a daily detailed report which shows all receipts, merchandise delivered, and balance on hand. In making shipments we prepare bills of lading, express receipts, etc., and also properly mark or stencil packages. Very often freight charges are to be prepaid and we advance the freight to the railroads for our customers. Sometimes it is necessary to repack or recondition merchandise, and we take care of this in the same manner as the customer would take care of it if his own employe were on the premises. Very often the Wander Company will prepay freight on a dealer's consignment if the order equals a certain amount in dollars and cents, and of course this means that we have to extend the various items on the order to establish a total in order to determine whether the consignment is to be shipped freight prepaid or collect.

Our trucking service is a valuable adjunct to our merchandise warehouse business as it enables us to give a store-door delivery service as expeditious as express service, but at much lower rates. Serving as we do thousands of clients, with almost 100 per cent productivity of our equipment, has enabled many small concerns to abandon their private trucking operation with its attendant excessive cost by reason of the great percentage of time which their trucks were idle.

Distribution of carload freight by a merchandise warehouse is an extensive task when you bear in mind all the services attendant to such distribution as undertaken by the warehouse man under a continuing agreement, i. e., recoopering service; packing, marking; addressing and billing shipments; the separation and distribution of carloads of [fol. 425] merchandise by marks, brands or kinds, in ac-

cordance with written instructions from the owners; weighing; correspondence furnishing information to our customers; making c. o. d. collections and remitting to our customers; prepaying bills of lading, shipping orders and express receipts; paying of freight charges on inbound shipments and prepaying freight charges on outbound shipments; and keeping stock records and furnishing inventories to our customers; all of which must be kept as accurately and carefully as bank records or railroad freight office records.

In our solicitation of this business we approach producers, manufacturers and wholesalers, describe our facilities and services and quote our rates or charges for same. If the prospect is located in Philadelphia we solicit them personally, but if out-of-town, we either have our traveling solicitors call on them or conduct negotiations by mail. Where our solicitation efforts are successful, we make an agreement with the manufacturer or wholesaler, incorporated in which is specified the railroad routing we prefer to have the goods shipped over, to handle his business for specified periods of three months, six months, a year, or longer. Most of our business is obtained through correspondence or as the result of personal calls by our traveling solicitors, as the majority of our customers do not have Philadelphia offices or representatives other than the Terminal Warehouse Company. By that direct solicitation or by correspondence, supplemented by our advertising, we and other merchandise warehouses induce these out-of-town manufacturers and wholesalers to ship their goods by railroad to us, or in our care, and we then distribute their [fol. 426] goods to points within two hundred miles of Philadelphia by railroad, steamship, motor truck or express carriers, rendering every service necessary to facilitate the trade of our patrons.

All of the services which I have described, including the loading of freight into railroad cars and the unloading of freight from railroad cars, are warehouse trade services which are performed by all merchandise warehouses under the terms of their contracts and arrangements with the manufacturers and wholesalers. It seems unnecessary for me to give additional details of our trade services because the details of the merchandise warehouse business, similar to our business and that of the subsidized warehouses, are

presented in the report of the Department of Commerce entitled, "The Merchandise Warehouse in Distribution."

There are five classes of inbound shipments to our warehouses: (1) Carload shipments consigned to us by manufacturers or wholesalers who ship from points outside Philadelphia for distribution in l. c. l. lots; we are the only representatives of these concerns in Philadelphia. (2) Similar consignments of goods from such outside concerns who have office space and sales agents in Philadelphia, but who have no facilities for receiving carload shipments and unloading contents of the cars in Philadelphia. (3) Carload shipments of goods for manufacturers and retailers in Philadelphia who have no facilities for receiving such large lots of goods as a carload is; they take the goods from our warehouses in small lots of one or two tons at a time. (4) Merchandise shipped to us and put in storage under condi- [fol. 427] tions enabling the owner to pledge the goods as security for loans. (5) Surplus stocks of goods shipped to us by manufacturers and put in storage in the off season.

99 per cent of the outbound shipments handled at our warehouses are l. c. l. shipments. We make those outbound shipments in connection with the distribution of the inbound carload shipments in l. c. l. lots. The other 1 per cent consists of isolated outbound carload shipments, which are exceptional.

There are four classes of rate payers who pay the freight charges on inbound shipments handled at our warehouse: (1) Some of the consignors prepay the freight charges at point of origin. (2) We pay the freight charges on some of the carload shipments and then allocate these charges and our distribution charges to the l. c. l. lots which we distribute, collecting the allocated charges from the receivers of the l. c. l. lots of goods. (3) We pay the freight charges on some of the shipments and then collect the freight charges and our warehouse charges from the consignor of the goods. (4) The railroad companies collect the freight charges on some of the shipments directly from the local dealers or manufacturers in Philadelphia for whom we handle the goods.

The warehouse companies that receive allowances from the railroads at Philadelphia are: Merchants Warehouse Company; Pennsylvania Warehousing and Safe Deposit Company; Philadelphia Warehouse and Cold Storage Company; and the Quaker City Cold Storage Company.

The Terminal Warehouse Company is a competitor of each of those warehouse companies that receive the allowances. The allowances have been used to divert business from the Terminal Warehouse Company to our subsidized competitors.

[fol. 428] I will explain that use of the allowances:

There are hundreds of well known concerns that employ warehouses to distribute their products in the Eastern cities. We and the subsidized warehouse companies actively compete in soliciting the business of those concerns. Those concerns ship their goods to the warehouse that can offer them the lowest aggregate charge for the distribution of their goods. The aggregate charge is made up of the railroad freight rates to the warehouse and the warehouse charges. Our subsidized competitors are enabled, by the allowances, to quote lower aggregate charges than we can quote and they underbid us and take competitive business away from us.

Some specific instances of that underbidding are:

Our subsidized competitors offer to distribute the merchandise of those concerns free of charge when the distribution is accomplished within 48 hours after the arrival of the goods at their warehouses, and at charges lower than the cost of distribution service when the goods are distributed later than the 48 hour period. For example, the Corn Products Refining Company have been one of our most valued customers for over 9 years. Mr. Harvey Miller, President of the Merchants Warehouse Company, is trying to entice the business of the Corn Products Refining Company from us, and the inducement which he offers is the total elimination of any handling charge whether the goods are delivered within 48 hours, a year or longer period, after the arrival of the goods at the Merchants Warehouse.

Some of the letters I offered in evidence substantiate that statement, without specifically mentioning the Mer-

[fol. 429] chants Warehouse individually.

The subsidized warehouses have enticed some of our good customers from us, including the Vacuum Oil Company, Post Products Company, Paper House of Pennsylvania, J. C. Hubinger Company, J. B. Ford Company, Bon Ami Company, Pratt Food Company, Theo. Presser & Company, Philadelphia Iroquois Company, and the Allis-Chalmers Manufacturing Company. We have been com-

pelled to reduce our normal warehouse charges in order to hold some of our customers under the disadvantage of the allowances.

Our best customers have demanded that we perform handling service free, or at reduced rates, as offered by the subsidized warehouse companies, and we had to accede to their demands or surrender the business to the subsidized warehouse companies. We are compelled to handle some of that business at rates lower than our costs of service. Some of these customers are Colgate & Company, Nestle's Food Company, Corn Products Refining Company, Kellogg Sales Company, Century Electric Company, Gardner-Denver Company, Proctor & Gamble Distributing Company, Spencer Kellogg & Sons and the D. L. Ward Company.

I could name more than a hundred large concerns that use merchandise warehouse distribution service extensively in marketing their products at the principal Eastern cities. I have concluded that the solicitation of business from certain of those concerns by the Terminal Warehouse Company would be unprofitable under present conditions.

We have not solicited business from many of such concerns during recent years and we do not intend to solicit their business while the allowances are given to the subsidized warehouse companies. If we should obtain their business at the rates they would give it to us for under the [fol. 430] competitive influence of the allowance, those rates would be lower than our handling costs. Therefore, we are compelled to abandon that business and let our subsidized competitors have it without a struggle. Those concerns include Washburn-Crosby, Quaker Oats Company, canned food brokers, sugar brokers—and in fact all patrons of warehouses whose products are promptly distributed or whose products are of heavy density, which business is eagerly sought after by the subsidized warehouses, for, by reason of this weight the allowance which they receive from the railroads for unloading would amount to from $12.00 to $15.00 per carload.

I will read the following from a letter dated June 22nd, 1928, from the Merchants Warehouse Company addressed to George Steere & Sons, which is included in Exhibit 6.

"There would be no charge on orders filed with us before the car is unloaded, and hauled by your customers within

forty-eight hours after the arrival of the car. If not hauled within forty-eight hours, the regular storage and labor rates would apply."

Now I will explain what investment charges, labor charges, and other charges are incurred by the Terminal Warehouse Company on freight hauled by Mr. Steere's customers within forty-eight hours after its arrival at warehouses of the Terminal Warehouse Company, if that freight were consigned to the Terminal Warehouse Company:

We would have to bear our investment in the warehouse where we handled the freight, the taxes, repairs and cost of maintenance to that property and equipment, also the proportionate share of the salaries of our general organization engaged in transferring the freight from the car and distributing it in small lots to customers of George Steere [fol. 431] & Sons. In order to meet the competition reflected in the offer in that letter, we would be compelled to handle the freight free of charge, when distributed for them within forty-eight hours of its arrival, and we would receive no compensation whatsoever on our investment, salaries, or to pay the wages of our laborers who perform the distribution. In other words, to meet that competition we would be compelled to do business without deriving any compensation therefor. Of course, the Merchants Warehouse Company is compensated for that service in the allowance of fifty cents a ton which is obtained from the Pennsylvania Railroad Company. We are compelled to surrender to the Merchants Warehouse Company virtually all of the business where the major portion of the carload is distributed within forty-eight hours. We can take some of the business and shrink our charge for distribution, or waive it entirely, when the larger part of the tonnage is not distributed within the forty-eight hours after arrival. But, of course, in those instances we are compelled to shrink our normal business profits.

When inbound carloads of freight consigned in our care arrive in break-up yards of the railroads in Philadelphia, the railroads immediately send us an arrival notice and a constructive placement notice which contains the usual information as to car number, shipper's name, contents, weight, etc. Upon receipt of such notice we issue a written

order to the railroad requesting them to place said cars in the building in which that particular customer's account is carried. When the car is placed, our Traffic Department gives to the warehouse superintendent a manifest of the car and a letter of instructions pertaining to distribution of the contents. The seals are then broken, the car unloaded and [fol. 432] contents checked as to outturn and condition; that portion of it which is intended for immediate reshipment is reshipped, and the balance put into storage according to the grades and marks. That portion of it which is put into storage is later on reshipped in l. c. l. lots by railroad, motor truck or water carrier, in accordance with written instructions of the owner of the goods. When incoming carloads are shipped collect, the railroad renders us a freight bill for the transportation charges, which we in turn pay within the prescribed time, namely, 96 hours. We also sign our name as the consignee upon the delivery receipt which the railroad makes up and presents to us.

On inbound cars placed for unloading the first activity of the Terminal Warehouse Company is to break the seals of the cars and then unload them. At the time we break the seals of the cars we are working under the instructions of our customers. Of course we have contracted to distribute the freight. We receive orders for distribution of each carload, which are mailed to us by our customers generally on the day they ship the carload of goods. We act on those orders when we break the seals, but we do not receive orders for distribution of some of the freight until several days or months after its arrival at our warehouse.

I will describe generally and very briefly the kinds or types of billing on inbound shipments and on outbound shipments:

When new business comes to us in response to our advertisements, the shipments generally come billed to us as the sole consignee thereof. Several of our customers have continued to use that form of billing for years; but we have instructed a large number of our customers to use the "care [fol. 433] of" billing because we prefer that kind of billing.

Of the two classes of inbound shipments some are generally billed to the Terminal Warehouse Company as the sole consignee and the other class of shipment is the care of billing.

There is no difference in the service performed by the Terminal Warehouse Company in handling shipments received under the "care of" billing and in handling shipments billed to it as the sole consignee thereof. The service performed by us in handling shipments covered by those two forms of billing are identical.

Those concerns whose names appear under the caption "Consignee" on those freight bills are not actually located in Philadelphia, and did not appear there to receive the shipments. They are usually outside concerns and they do not come to Philadelphia to receive the inbound shipments. The Terminal Warehouse Company contracts to receive the shipments in Philadelphia and to perform all of the consignee activity in Philadelphia.

We receive the inbound carloads at our platform on our private side tracks. We unload the car and sign a receipt to the railroad for that carload of freight transported at carload rates and in many instances we paid the freight charges on those carloads.

Several prominent business concerns in Philadelphia that have warehouses equipped with railroad sidetracks are John Wanamaker, the well-known department store, whose warehouse is located on Washington Avenue, and his sidetrack connection is with the Pennsylvania Railroad; Straw-
[fol. 434] bridge & Clothier, also a well-known department store; the American Stores Company and the Great Atlantic & Pacific Tea Company, well known retail grocery chain stores; Sears, Roebuck & Company, the well known mail-order concern; and the Goodrich Tire & Rubber Company. I have visited those warehouses several times. I have visited most recently Sears, Roebuck & Company and Strawbridge & Clothier on July 24, 1928, and July 28, 1928.

Those two concerns employ our warehouse facilities at times when their own facilities are insufficient, and in their negotiations with us, conducted with me, and in according them the warehouse services they needed, I became informed of the use to which they put warehouse facilities.

They use warehouse facilities to enable them to buy stocks of goods in the quantities and at the times that will enable them to take advantage of lowest market prices, and at the same time supply the demands of their customers. In other words, they get the goods in carloads, at carload rates, and

then sell and distribute them through their retail stores in l. c. l. lots to their customers.

The retail dealers in Philadelphia use the facilities of the merchandise warehouse companies because the high property value and high rentals of retail stores on prominent business streets preclude storage of large quantities of goods there and compel these concerns to use warehouse facilities not handicapped by the high property values. The merchant in the small town where property values are low owns facilities for receiving and storing carloads of goods. [fol. 435] But in the large cities like Philadelphia, where property values are high, the merchant or retailer owns or rents limited selling facilities and then hires warehouse services from the large warehouse companies which enables the merchant or retailer to obtain use of facilities for receiving and storing his carload freight.

Generally the manufacturer or wholesaler asks us to specify the route of inbound and outbound freight. They do not know what railroads have direct access to our warehouses and they desire to avoid extra switching charges and to get the lowest possible freight rates. In most cases we specify the railroad route when we enter into a contract or arrangement to handle the goods.

We don't pass those additional freight claims arising from the allowance on to our customers because we can not pass it on to any person. When we do not, or cannot, shrink our aggregate charge to reflect the allowance the outside concern will not give us his business. In such case he gives his freight to the subsidized warehouse companies who underbid us.

Assume that the giving of the allowances was stopped on September 1, 1928, we would not be relieved of the discrimination on and after that date. The subsidized warehouse companies have used the allowance for many years to build up their business and to suppress the development of the business of their competitors. When the allowances are discontinued they will have the established trade built upon those allowances and they will keep it for a long time. It will require years for us to recover our fair share of competitive merchandise business.

[fol. 436] None of the warehouses of the Terminal Warehouse Company operated to their full capacity during the period from January 1, 1926 to date, due to the handicap

of being forced to compete with warehouses who receive allowances from the railroads for the unloading of cars, amounting in many cases to as much as $15.00 per carload, we were never able to obtain a fair proportion of the warehouse and distribution business of Philadelphia.

At the time the Terminal Warehouse Company had that unused capacity it was being deprived of merchandise business by the competition of the four subsidized warehouse companies receiving the allowances.

I will mention the individual commodities and describe in detail how the Terminal Warehouse Company was deprived of reasonable opportunity to handle those commodities under the competition of the four subsidized warehouse companies:

The storage and distribution of flour is controlled by the subsidized warehouses solely by reason of the unloading allowance granted to them by the railroads. This allowance enables the subsidized warehouse to totally eliminate handling and storage on all that portion of the cars that is delivered within the first 48 hours after the car's arrival at the warehouse. In the case of flour they also eliminate any handling charge on that portion of the carload going into storage and eventually delivered in l. c. l. lots. In soliciting these flour accounts for storage and distribution, we were told that the construction of our warehouses and their locations were ideal for the flour trade, but that they would be unable to give us any business unless we were [fol. 437] willing to meet the rates and extend the free handling privilege granted to the flour trade by the subsidized warehouses. In former years we handled thousands of bales of cotton linters annually through our warehouses at rates that were only nominally compensatory. However, about four years ago, the Merchants Warehouse Company started a drive for this class of business and quoted rates approximately 50 per cent less than our charge. They were able to do this only because of the allowance they received from the railroads. Being unable to meet the rates of the subsidized warehouses, the Terminal Warehouse Company has lost this business entirely. It is absolutely futile for the Terminal Warehouse Company to solicit the storage and distribution of broom corn and feed as the jobbers or dealers in these products are in many cases able to distribute the entire carload within 48 hours of the ar-

rival of the cars at the subsidized warehouse and do not have to pay one cent for all the clerical and physical labor necessary to properly distribute this merchandise because the subsidized warehouses receive their recompense out of the unloading allowance paid them by the railroad companies.

I heard the stipulation that was made between counsel this morning as to the form of billing of freight delivered to the Merchants Warehouse Company—there were two forms of billing. As to whether it makes any difference whether the freight is billed in one or the other of the two forms shown in that stipulation, it makes no difference.

The substance is the same under either of those two forms of billing. When we solicit business from out-of-town concerns the aggregate charge is what gets the business. Our aggregate charge is the same under either form of billing and we perform similar distribution service under either form of billing. The solicitation and the service performed by the subsidized warehouses is the same under either form [fol. 438] of billing, and the discrimination against us is not less on a shipment billed in their care, which they distribute, than it would be when billed to any one of those subsidized warehouses as the sole consignee thereof. The name entered on the bills of lading and railroad billing are those that the warehouse company suggests be put on when it contracts to distribute the goods. We can have the consignors bill their shipments to John Doe or Richard Roe, in our care, and those shipments will be delivered at our warehouses, and when we distribute the shipments the services which we render will not differ from the services which we would render if the shipment had been billed to the Terminal Warehouse Company as the sole consignee thereof. We contract to distribute carloads of goods for outside concerns.

My exhibits 31 and 32 are copies of letters from the Traffic Department of the Pennsylvania Railroad and the Traffic Department of the Reading Company relating to these allowances. I will state the circumstances which led up to the writing of those letters:

Back in 1924 we had repeated requests from the patrons of our warehouse to reduce our charges or eliminate the handling charges. We, of course, informed them that we could not do it. They referred back to us the practice of

the warehouses which I will call the subsidized warehouses, according that privilege to shippers, and I informed them that we, as presumably other merchandise warehouses, had made repeated requests to the railroads to have this discrimination removed.

I was trying to give you the reason why this Association called the meeting. It was the result of their request for a [fol. 439] lower rate. Finally, we just told them we could not do anything for them, and they at their Association meeting resolved to call in representatives of the railroads at a meeting. That is the Association of Manufacturers Representatives, Inc., Philadelphia.

So they called this meeting at which were present representatives of the three railroads, a great number of the members of this Association, plus some few warehouse men. They protested to these representatives of the railroads as to the practice of confining the allowance to one or two warehouses and not making it applicable to all warehouses so that all members of that association could get the benefit of the free unloading or handling service.

The representatives of each of the three defendant carriers who was present at that meeting are:

As I recall them; Mr. W. H. Willis, Division Freight Agent of the Pennsylvania Railroad; I believe Mr. B. M. Croll, Division Freight Agent of the Reading Company and I do not recall who represented the Baltimore & Ohio. As I recall it, the Baltimore & Ohio was represented—I do not know that—I would not swear to it.

These representatives of the railroads suggested to the Association that they write a letter to their respective railroad companies and that same would be taken up by the proper officers and reply made. That is the reason for these letters.

The letters were written by the Association and Exhibits 31 and 32 are the replies received.

Mr. Hickey: I offer Exhibits 14 to 32 in evidence.

Examiner Brown: Exhibit 15 contains statements of class [fol. 440] rates from Philadelphia. Are you offering that as evidence of the rate from Philadelphia?

Mr. Hickey: No.

Examiner Brown: Those rates may be disregarded?

Examiner Brown: Exhibits 14 to 17, inclusive, and Exhibits 19 to 32, inclusive, will be received in evidence. Ex-

hibit No. 18 will also be received in evidence, but is understood that rate statements in this exhibit and statements with respect to storage charges in dollars and cents will not be considered as a part of the exhibit.

(Exhibits Nos. 14 to 32, inclusive, were received in evidence.)

[fol. 441] Room 1103 I. C. C. Building,
Washington, D. C., Wednesday, August 1, 1928.

Met pursuant to the taking of adjournment at 10 o'clock A. M. before R. M. Brown, Examiner.

Appearances: The same as heretofore noted.

Examination of ERNEST V. D. SULLIVAN resumed.

Cross-examination.

By Mr. Glasgow:

This Terminal Warehouse Company has been in business since 1904, I presume in some of the same locations in which we are now doing business. They had possibly four or five warehouses. I do not know what those buildings had been used for previous to that time. The company is a corporation now. It was incorporated I would say roughly [fol. 442] around 1920. Prior to that time it was an individual—Thomas D. Sullivan (my uncle)—trading as the Terminal Warehouse & Transfer Company.

I do not know whether there were any other partners in it. It was before my time, and I am not familiar with it. I have been with the company only during the last ten years. The partnership came down to 1920—no, not partnership. So far as I know, the business was conducted by Thomas D. Sullivan, trading as the Terminal Warehouse & Transfer Company, approximately down to 1920.

So far as I know, nobody was associated with him prior to the formation of the corporation. I think it was originally capitalized for a quarter of a million dollars. I am only a very minority stockholder now. I became a stockholder about the time it was incorporated, about 1920. I do not know how that stock was paid for. Mine was given to me.

The capital now is $500,000. I do not know whether that was paid in in cash. The stock is non-assessable, at a par value of $100 a share. I do not know what surplus the company has. I stated the value of the facilities which we operated as warehouses to be about $5,000,000. I did not say we acquired them, I said that we operated them. We operate them for ourselves. They are owned—some by us and some by other people. I am stating in that $5,000,000 somebody else's property. We operate it on lease. The proportion of that that is owned by our company I would say is approximately $3,000,000 or $3,500,000. I do not know where the money came from for the investment of three or upwards of three million dollars in this company with a capital paid in for capital stock of $500,000.

[fol. 443] The business has been profitable to a certain degree. There have been profits made. It was profitable last year. I do not know what dividends they were paying. I did not get any dividend—I did not inquire why.

I would say I am a small stockholder. I do not know what were the net earnings last year of this company. It did not pay dividends last year, not to my knowledge. At least, I did not get any. It did not pay any the year before, not to my knowledge, because I did not get any.

I am a director of the company and have been a director since its incorporation. The company never paid dividends to my knowledge. I would know, unless it would happen to have been done when I was not present at a directors' meeting. I said we made some profits.

Naturally the company has made return for taxes to the Government of the United States when earned. I do not know for what years. I have nothing to do with that part of our organization's work, you will have to ask our treasurer that question. I do not know whether or not any new capital was put into the concern after its organization. Our company is engaged in loaning money to customers, to a very, very slight degree. That is a part of my activities, being in charge of sales. By sales I mean solicitation, sales of warehouse service, trade service.

Q. Let me ask you something. I noticed in your testimony that you referred to the Merchants Warehouse Company having taken away, I think you said, the business of the paper company of Pennsylvania from your company?

[fol. 444] A. Yes, sir.

Q. Is that the correct name of the company?

A. It was at the time we were doing business with them.

Q. In the first instance, you took it away from the Merchants, did you not?

A. I am not familiar with the fact that they were with the Merchants before we got it, Mr. Glasgow.

Q. Do you know where it was before you got the account?

A. No, I do not.

Q. Then, is it not a fact that after you took it away from the Merchants, the Merchants got it back from you?

A. I know that the Merchants got it back from us, but I would not answer the question as you have asked it, Mr. Glasgow.

Q. It was within the line of your business as Solicitor to know where the business came from, was it not?

A. Not necessarily, Mr. Glasgow. The primary interest is to get it.

Q. But don't you know where you get it from?

A. We get it from the man we solicit, yes, but we don't necessarily have to inquire with whom he is doing business.

Q. You took away from the Merchants Warehouse Company the business of the Curtis Publishing Company, recently, did you not?

A. We did not take it away. They gave it to us.

Q. It came from the business theretofore done by the Merchants?

A. Yes, sir.

Q. Now, I suppose you make a distinction, then, as to [fol. 445] when the Merchants takes it away from you, and then when you go to get it, you did not take it, but it was given to you. Is that the distinction?

A. I make a very strong distinction. Do you want the reasons?

Q. I did not ask you for them. If you want to give any, go ahead.

A. The reason is they are able to get it away from us by reason of this allowance and free handling which they perform. We cannot take it away from them.

Q. How do you get it?

A. In the instance to which you referred, they asked us to handle the account.

Q. Who?

A. The Public Ledger.

Q. You were not trying to get it?

A. We would like to get it.

Q. Now, Mr. Sullivan, tell me, did you go out and try to get the business?

A. Not at the time we secured it.

Q. Did you go before?

A. Years before, yes, sir.

Q. The Bon-Ami business, you also referred to as having been taken away from your company by the Merchants. Did not you get it from the Merchants previously?

A. Yes, sir.

Q. You got it from them and then they got it back from you?

A. Yes, sir.

Q. You got the Simmons-Bed Company from the Mer-
[fol. 446] chants, did you not recently?

A. Yes, sir.

Q. The Merchants had been conducting the business before and you took it away from them, did you not?

A. We did not, no.

Q. You still have it?

A. We did not. That was all done by a real estate agent in Philadelphia, Mr. Glasgow. The Terminal Warehouse Company had nothing to do with that.

Q. But you got it?

A. They utilized one of the facilities which we had, yes.

Q. Don't let us be technical. They are taking warehouse service from you, are they not?

A. No, sir.

Q. They are taking a warehouse space, from you, are they not?

A. They rented an entire building which we had no further use for.

Q. As a matter of fact, there are other cases where you have taken business from the Merchants and other cases where they have taken from you?

A. I presume there are, yes, I would say, yes, Mr. Glasgow.

Q. When I referred to the Curtis Publishing Company, I should have said instead of that the Public Ledger Company.

A. I knew what you had reference to.
Q. That is what you had reference to?
A. The same thing, yes.

[fol. 447] Cross-examination.

By Mr. Bikle:

When I explained the manner in which traffic came to our warehouse, I said that some of it came billed to us and some of it came billed to others in our care. And I also said that we preferred to have it come billed to others in our care. The reason is we operate numerous warehouses in Philadelphia. Possibly I can better explain it by referring to a particular commodity, we will say, linseed oil. We handle about six different accounts, who store linseed oil with us. If our customer did not indicate on the bill of lading his name and those cars came billed directly to the Terminal Warehouse Company, we would have no manner or means of knowing whose linseed oil it was, or into whose warehouse we could direct the railroad to put that car. That is the primary reason.

Another very valid reason for it would be that there would be a complete tie-up of chain of title in the event our customer wanted to borrow on that merchandise. That is an important commercial reason, from his point of view, in having it consigned to himself in our care.

Q. If it is consigned to you—I don't want to use a controverted term—but if it is billed to you, then, he is not in a position to borrow in the same way from the banks on the shipment, is he?

A. The title would be somewhat clouded, I would say, Mr. Bikle.

Q. Now, taking the first reason, as I understand it, you preferred to have it billed to the owner or his representative in your care, so that you may know how to follow his wishes in regard to the handling of that traffic.

A. Well, primarily our wishes. We would not know where [fol. 448] to order the railroad to put the car unless we knew who owned the merchandise contained in the car.

Q. That is what I mean. You have to take care of that

matter in order to determine how it shall be handled, don't you?

A. So far as I know who owns it, if that is what you mean, Mr. Bikle.

And in our handling that freight we follow the instructions of the owner of the goods or his representative in respect to delivery to certain persons. Now, where a shipment is involved, that is usually left to us to determine via what means of conveyance or what route or steamship line that shipment should move. But if it is left to us, it is because the owner or its representative chooses to leave it to us. I mean, if he asserts the privilege or saying what carrier we should use, or what route we should use, we would recognize his directions, but that would be the rate exception, that they would so designate it, but we recognize his right to do it.

Now, as to what proportion of the shipments are billed to us direct and about what proportion are billed to the owner or representative in our care, I would say that approximately ten per cent were billed direct to us and the balance in our care. I referred to the shipments of Colgate & Company as being shipped to us; if I recall correctly, they are billed directly to us.

Now, as to the payment of the freight charges, we pay the freight as a part of the service which we render, and they are taken into our account, all such matters as taxes, interest and labor, and so forth. I said we had to keep our records as carefully as a bank.

We do not recollect those freight charges from the owner or his representative in their entirely. We do not recollect [fol. 449] from Colgate & Co. the freight charges on their shipments—that happens to be an account that bills their shipments prepaid. When we agree to handle the distribution of an account, we take all items of expense and they are taken into consideration, of course, when we make the rate, but we do not pass on the freight charges in their entirety to our customer.

Q. When you make a distribution, such as you have described, for the person to whom the shipment is billed in your care, don't you distribute the freight that you pay the railroad, in the first instance, proportionately against

each part of that that is turned over to the ultimate receivers?

A. If you have reference to the one account that I specifically mentioned yesterday, that is, the furniture manufacturers, I would say yes.

Q. Is not that the practice generally.

A. That is what we call a pool car.

Q. Is not that the practice generally on the pool car?

A. No, that is the exception.

Q. Then, will you explain just what the method is by which you do business with regard to the pool cars, describing the matter of freight charges?

A. In the matter of freight charges, we, in many instances, do as they do in storage accounts, pay the freight, take it into our accounts, handle it, and then we bill them, we will the aggregate charges for recoopering, clerical services, handling and so forth.

Freight is incorporated in our charge. A number of items also would be included in there as well as freight. [fol. 450] Freight is one of the items taken into consideration in our billing. The way we handle it, is that freight is just an item of expense, the same as any other item of expense, such as labor, interest, taxes, and so forth or anything else, and when we bill out charges for the services we render, freight is one of the items, of course. I think it is specifically included in the bill to our customers. As to whether or not it is included in its entirely, well, if, for instance, we have to reduce our charges in order to meet the competition of that so-called subsidized warehouse, freight bears its percentage of shrinkage, the same as any other item of cost we would have. In other words, in some instances, we absorb a proportion of the freight charges, and in some instances we pass the entire charge onto the customer.

The ordinary practice is on our bills to our customer we show the freight as an item charged against him—it is a part of the bill.

I referred to certain companies which have warehouses, John Wanamaker's, Strawbridge and Clothier and Sears Roebuck. Those warehouses are not utilized for the storage of business, other than that of the owners. I mean, they are not in the business of taking property for storage.

My testimony, however, indicates that my thought that the smaller dealers which could not afford warehouse space were able to find in our company and other companies facilities that helped them on account of the ability of the larger dealers to have these warehouses. In other words, they would have to have some warehouse facilities, if they received carload lots, and if they themselves don't have it, they have to employ the facilities of someone who has it.

The only significance of the reference to these larger [fol. 451] companies was they had warehouses with private side-tracks. It is of material advantage to these smaller dealers to have warehouse facilities, such as ours, in their competition with these larger dealers. We get about one per cent of our business from points inside Pennsylvania—not over one per cent of the total business that we received is intrastate business.

It is my view that we are not getting our fair share of the business. I regard as our fair share—well, more than we are getting today.

By Mr. Webber:

I said that the Baltimore & Ohio served or reached one of our warehouses, the one at 25th and Locust. We only handle automobiles there. It is a temporary arrangement.

By Mr. Woodcock:

We don't do any cold storage warehouse business. We have no refrigeration. We store some commodities which are sometimes put into cold storage warehouses. We have no refrigeration facilities in any of our warehouses. The capacity of our warehouses has been increased since I went with the company, ten years ago. I would say approximately 40 per cent in square feet.

By Mr. Stilwell:

Mr. Sullivan, you have taken business away from the Pennsylvania Warehousing and Safe Deposit Company, haven't you?

A. I don't recall any at the present time. If you would mention the names of any accounts, I might be able to tell you.

Q. Now, then, I am going to ask you about a particular case. You took the Theodore Presser business away from the Pennsylvania Warehousing and Safe Deposit Company, did you not?

[fol. 452] A. I did not know that Theodore Presser was with the Pennsylvania Warehousing & Safe Deposit Company. I thought they were at the Merchants Warehouse, as I recall.

Q. You, in your direct testimony yesterday, complained that the Merchants Warehouse had taken the Cord Products Company away from you, did you not?

A. No.

Q. You did not say that?

A. No, sir.

Q. You took it away from the Pennsylvania Warehousing & Safe Deposit Company, did you not?

A. We have had that account for about nine years. That was just about the time I came with the company.

We receive shipments on order notify bill of lading. We handle them the same as any shipments we receive subject, of course, to the fact that we won't make delivery prior to the surrender of the order bill of lading. As to whether those goods go into our warehouse before the draft is paid, well, I would not say before the draft is paid. I would say before the bill of lading was surrendered to us they go into our warehouse. Then the notified party comes along afterward, presenting the bill of lading, and takes the goods, whomsoever would secure the bill of lading from the bank and present it to us. Normally it would be the notified party. Those goods do not remain in warehouses in such cases for any considerable period before the surrender of the bill of lading; from the time we receive them until the notified party, or somebody else, takes the goods. Not in package freight, I would say no, because the railroads are [fol. 453] after us constantly to surrender them almost immediately upon receipt at the warehouse.

We handle no other kind of freight except package freight, unless you would construe automobiles other than package freight. The method of handling automobiles is about the same as in handling other freight, only at certain times of the year bills of lading are handled a little bit differently on automobiles than on what we call merchandise freight.

Redirect examination.

By Mr. Hickey:

In response to Mr. Glasgow's questions about sometimes the Terminal Warehouse Company getting the business of the Public Ledger Company and the Bon-Ami Company and the Simmons Bed Company, and sometimes the Merchants Warehouse Company getting the business of those concerns, there was cutting of rates involved in the competive activities of those two warehouse companies in getting the business of those concerns and in the cutting of the rates to get that business the Merchants Warehouse Company had a distinct advantage, but the Terminal Warehouse Company did not. That advantage was the allowance which they received from the railroads for performing the unloading of cars.

Recross-examination.

By Mr. Bikle:

We apportion freight charges in conjunction with our distribution of the charges to the persons to whom we are directed to distribute. All items of expense are billed to our patrons. Freight is an expense and therefore it would be billed—I would not say specifically billed.

[fol. 454] E. F. Morgan thereupon was called as a witness on behalf of the complainants and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

I was in the service of the Interstate Commerce Commission from June 15, 1909 until June 15, 1920; the first five years in the Bureau of Carriers Accounts as Examiner of Accounts, and the last six years with the Bureau of Valuation as a District Accountant of the Central District in Chicago. As a condition precedent to that employment I took a Civil Service examination for position as Examiner of

Accounts, Interstate Commerce Commission and was passed and certified by the Civil Service Commission.

Prior to my services with the Interstate Commerce Commission, from 1897 to 1909, I was in railroad service as Telegraph Operator, Station Agent, Chief Clerk to Division Superintendent, Train Dispatcher and various capacities in the Accounting Department.

Mr. Bikle: Mr. Examiner, would it not be better, subject to Mr. Hickey's approval, to let the witness go ahead with his testimony and if any of us question his competency, we can ask that he be qualified.

The Witness: From June 15, 1920, until the early part of 1926, I was with the C. B. & Q Railroad Company in the Accounting Department, particularly in connection with valuation matters, federal and state taxes.

From January 31, 1928, I made a study of the published tariffs of the defendant carriers, the Pennsylvania Railroad Company, the Baltimore & Ohio Railroad Company and the Reading Company, in so far as those tariffs have [fol. 455] application to the allowances under consideration in this case. I also examined the bills and invoices, car record books, shipping orders, bills of lading, quotations of services, charges, circulars, advertising matter, and correspondence of the warehouse companies operated by the complainants. I also viewed their buildings, structures, railroad sidetracks and platforms. I observed the various quantities of goods, wares and merchandise contained in those warehouses, also the activities of employees of the complainants in handling the goods, wares and merchandise there. I also sought and obtained whatever information I needed from the officers and employees of the complainants and examined whatever records of complainants I needed for the information which I have assembled. All of the warehouse properties which I deal with are located in the City of Philadelphia, in the State of Pennsylvania. At various times during the period mentioned I also viewed the properties of the Merchants Warehouse Company, the Pennsylvania Warehousing and Safe Deposit Company, the Philadelphia Warehousing & Cold Storage Company, and the Quaker City Cold Storage Company, that is, their buildings, structures, railroad sidetracks and platforms.

I prepared certain statements in which I incorporated much of the information I collected in shape that I can now offer them in evidence.

Mr. Hickey: I will now offer those statements in evidence and I would like to identify each individual statement.

(At this point an informal discussion was had off the record, after which the proceedings were resumed as follows:)

Mr. Hickey: They are now offered for identification, and [fol. 456] I will not identify them any further.

The Witness: The revenues derived by the complainants in the conduct of their warehouse business accrue from the performance of the following services:

1. Handling or transferring freight to or from various railroad cars, and to or from various locations on the several floors of the warehouses, and to or from motor trucks.
2. Separation and distribution of carloads of merchandise into l. c. l. lots.
3. Short term storage.
4. Long term storage.
5. Leasing of warehouse space.
6. Coopering packages.
7. Marking and weighing freight.

The complainants also render incidental services for their patrons consisting of billing goods for outbound transportation, issuing negotiable or non-negotiable warehouse receipts, signing delivery receipts for inbound shipments, accounting for the handling and the distribution, replying by letter or other means to their patrons, the handling, distribution, storage, spot stocks and other services rendered for and in behalf of the patrons.

The following incidental services, dealings between the complainants and the defendant carriers, also are performed by the complainants:

They receive from the defendants a notice of arrival of the inbound loaded cars, and then other action follows: Namely:

The railroad places the cars on the sidings at the warehouses.

[fol. 457] The warehouse companies sign delivery receipt acknowledging receipt of the carload of goods.

They unload the freight from cars to their warehouses.

They release the empty cars to the railroads.

They pay the freight charges on many such shipments to the defendant carriers in the regular course of business.

For outbound shipments the complainants order the railroads to place empty cars for loading such shipments at their warehouses, and the other steps taken are as follows:

The railroad pursuant to the order places the car for loading upon the sidetracks at the warehouses.

The complainants then load the cars there. The complainants prepare the bills of lading and shipping orders and present them to the railroad.

The railroad takes the shipping order and after signing the bill of lading, gives the bill of lading to the complainants.

Sometimes the complainants prepay the freight charges to the railroad.

The railroads company accepts the carload of goods and transports it in accordance with their shipping order.

Where the complainants prepay freight charges on outbound shipments and where they pay the freight charges on inbound shipments, they collect the freight charges and the warehouse charges either from their patrons of from the customers of the patrons.

The source of the information on my Exhibit No. 37 and 37-A to 37-F is the record at each one of these warehouses, [fol. 458] from what I saw being done myself and from statements of the employees of the various warehouse companies.

The Reading Company has issued a printed pamphlet showing lists of private sidings at Philadelphia and the names of the concerns taking deliveries from the private sidings, under date of November 1, 1926, entitled "Circular No. 225," and the Pennsylvania Railroad Company issued such a publication under date of April 26, 1926, entitled "Circular FD No. 199."

I am prepared to describe the delivery of carload freight to one of the concerns named in those publications. I got the information that enables me to do so when I visited the office of this party and also the property on which the siding was located and examined the delivering facilities. I have a copy of a freight bill for one of those shipments, that is, a shipment of lumber. I saw the lumber. The name of that

party is H. B. Wilgus. He has a lumber yard located at 1406 North Delaware Avenue in Philadelphia, served by a private siding, having connection with the railway lines of the Reading Company and the Pennsylvania Railroad Company. Inbound shipments of lumber are placed by those carriers for delivery on that private siding.

The activities of H. B. Wilgus in receiving inbound shipments of lumber are:

After the car is set for delivery on the private siding he unloads the lumber from the car and piles it on the ground in his lumber yard. After the car is set for delivery on the private siding, he unloads the lumber from the car and piles it.

[fol. 459] Mr. Wilgus has a sales office located at 1505 North Delaware Avenue, but I will not describe his office facilities. He has and uses a sidetrack and the ground and facilities in his lumber yard for taking delivery of that carload shipment. He also employs laborers and pays their wages involved in unloading the lumber from the cars and placing it at suitable locations in his lumber yard. He has to bear the cost of the investment—I am testifying as to this particular car; what I saw and know about it.

Mr. Hickey: I offer in evidence the exhibits which have been identified as Nos. 33 to 40 inclusive.

Mr. Glasgow: I desire to enter an objection to 37, 37-A and to and including 37-F. My objection to it is that the effort is to put in the form of an exhibit what, if you will read you will clearly see is the evidence or purported evidence of the witness; not an exhibit at all. For instance, if I may illustrate, Exhibit 37 is headed "Classification of Traffic, Customers and Rate Payers who obtain Warehouse Services at Philadelphia." "This exhibit shows a summation of the information in Exhibits bearing the numbers.

"Traffic: The inbound traffic is of the following classes:

"1. Carload freight"—and so forth.

Examiner Brown: Is it your contention that it is improper to submit testimony in the form of an exhibit?

Mr. Glasgow: It is, sir. The witness is to testify as to facts. He is subject to cross examination and you cannot write out his testimony and put it in in the form of an exhibit.

[fol. 460] Mr. Bikle: Mr. Examiner, I object to exhibits 37 and 37-A to F inclusive, for the same reason that Mr.

Glasgow has stated; that I don't think the material therein contained is proper for exhibit submission.

Examiner Brown: Would you object to the information if it were submitted in the form of testimony?

Mr. Bikle: That is what I was going to say, sir. Personally, I should not object at all if that method were used in this proceeding, except I think the way in which the report is made it is argumentative, and I think that I may perhaps ask Mr. Morgan, without meaning the slightest offense, that this was made after collaboration with Mr. Hickey and with his advice and correction, was it not, Mr. Morgan?

The Witness: He went over it.

Mr. Bikle: And suggested changes?

The Witness: At times, yes sir.

Mr. Bikle: To illustrate what I mean, Mr. Examiner, I am anxious to debate this case with Mr. Hickey on the facts, and I think he is with me, and I don't want any statements to go into the record that are unobjected to by me that I think are susceptible of misconstruction. Now, if you will take Exhibit 37 and take the description of the traffic, it says: "Carload freight, transported at carload rates delivered by the railroads to the warehouse companies and then distributed in less-than-carload lots by the warehouse companies."

Now, from my point of view, as a lawyer in the case, none of that freight is legally delivered to the warehouse com-[fol. 461] panies except the freight that is consigned to them. The other freight is delivered to the consignees who have received it through the agency they have selected, namely, the warehouse company, just as they would receive it if they sent their teamster down to get it for them. In other words, if Mr. Morgan were the consignee of the shipment and he sent his teamster for the freight, Mr. Y, they would not deliver that in legal contemplation to Mr. Y, but Mr. X. As this is presented here, that is susceptible of misconstruction, misinterpretation, and what I am anxious to avoid is that there shall be no intimation on my part that I think that is a correct description. For that reason, I feel constrained to object not only because it seems to me the information is not properly presented in this form,

but because I think in every instance the phraseology is such as to lead to misunderstanding and misconception.

Mr. Woodcock: I object to the exhibits mentioned for the same reasons as those stated by Mr. Bikle on the record.

Examiner Brown: Exhibits 33, 34, 35, 36, 37, 37-A, 37-B, 37-C, 37-D, 37-E, 37-F, 38, 38-A, 38-B, 38-C, 39 and 40 inclusive will be received as Complainants' Exhibits, subject, however, to the objections made of record. Exhibit No. 35 is received with the understanding that contracts of the Baltimore & Ohio Railroad Company and of the Reading Company, similar to those contained in Exhibit No. 1, will be introduced in this proceeding. When introduced, this exhibit will merely be a summary of the warehouses shown in those contracts, and this exhibit is received as supplementary to Exhibit No. 1 and as supplementary to those other exhibits. Exhibits 37 and 37-A to 37-F inclusive, [fol. 462] are received as I have stated, subject to the objections made by counsel. Certain of the information contained in those exhibits is in the nature of argument, but there is also information in the exhibits which I consider proper evidence. Under the circumstances, I would be unwilling to exclude any portion of those exhibits because portions of them are in my opinion pertinent and proper evidence. The witness has not qualified, in my opinion, as an expert, and these exhibits are received with that understanding.

(The documents above mentioned were received in evidence, and marked "Exhibits Nos. 33, 34, 35, 36, 37, 37-A, 37-B, 37-C, 37-D, 37-E, 37-F, 38, 38-A, 38-B, 38-C, 39 and 40, Witness Morgan.")

Cross-examination.

By Mr. Bikle:

Turning to my exhibit No. 37-A, where I state under page one, under Part one, under the designation one: "Carload freight, transported at carload rates, delivered by the railroads to the Warehouse Company and then distributed in less-than-carload lots, by the Warehouse Company," I am not dealing in the legal phase at all. What I mean, is that that carload of freight is taken into the Terminal

Warehouse Company, put on its sidings, and that the goods are taken out of the car by the employees of the Terminal Warehouse Company into the building of the Terminal Warehouse Company.

My phraseology is intended merely to describe that physical situation and it is not intended to indicate that the employees of the Terminal Warehouse Company are acting exclusively for the Warehouse Company or through the Warehouse Company for some one else. It is just a mere statement of physical facts.

[fol. 463] Now, when I say in the paragraph following, No. 2, that, "Carload freight, transported at carload rates, delivered by the railroads to the Warehouse Company and then reshipped in carloads by the Warehouse Company," that No. 2 represents freight that is covered by stuff that went into storage and then later was reshipped in carload lots. This is just a statement of what happened physically. That is a fair statement of all the similar descriptions that appear in these exhibits 37 and 37-A to 37-F inclusive. There are some few minor differences. For example, the Terminal has not got any storage, and this first one has no storage in transit, does not handle any freight stored in transit.

Mr. Hickey: I concede or admit what Mr. Morgan has incorporated in Exhibit 37 and 37-A to F are statements of the physical facts, and he did not intend to interpret any billing of anything having the legal significance that you refer to, in these exhibits.

The Witness: So far as those two matters to which I referred, the handling of the goods from the railroad to the warehouse and from the warehouse to the railroad, in what I have described as reshipments, I am merely describing the physical handling of the goods in the two cases.

Warren T. Justice was thereupon called as a witness on behalf of complainants and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

My name is Warrent T. Justice. I am in the service of the Pennsylvania Warehousing & Safe Deposit Company

[fol. 464] in the capacity of General Superintendent. I have been in the service of that company 25 years. That company is engaged in warehousing and banking in Philadelphia and has been since 1872. Its general office is located at 111 South Third Street, Philadelphia. The location of its several warehouses are, 23rd above Race; 16th and Gallahand; Richmond and Cambria; and a group known as the Delaware Avenue Stores, reaching from Delaware Avenue and Pine to Delaware Avenue and Catherine, and Delaware Avenue and Poplar Streets.

The location of each of the buildings, of the structures, included in that is: Delaware Avenue Stores Nos. 1, 2, 3 and 4; Pennsylvania Stores; Pennsylvania Tobacco Stores; Moro-Phillip Stores; Atlantic Stores; and West Indies Stores.

Nos. 1, 2, 3 and 4, have private sidings connecting with the Philadelphia Belt Line; or, the Reading and B. & O. through the Philadelphia Belt Line and Pennsylvania Railroad. This tobacco warehouse is not equipped with a private siding.

Inbound shipments handled at the tobacco warehouse are delivered through the tracks into the Delaware Avenue Stores Nos. 1, 2, 3 and 4.

We get the goods from those cars over to the tobacco warehouse sometimes by motor trucks and sometimes hand trucks. The distance is about 75 feet. The cars that we want to truck across the street are placed in the nearest position. The nearest we can get is approximately 75 feet. The longest would be 200 feet, approximately. When it is 200 feet, it is trucked, sometimes by motor truck, sometimes by hand truck.

The range of distance is 75 to 300 feet from this warehouse.

[fol. 465] We get allowance on traffic handled through this warehouse from the Baltimore & Ohio and Reading Company.

The West Indies stores are not served by private sidings.

Delivery of inbound freight which goes into the West Indies stores is made by the Moro-Phillips Stores track. Those tracks are about 300 feet away from the West Indies Stores.

Motor trucks are usually used in getting the freight be-

tween the West Indies Stores and the railroad cars. We get allowances on that freight.

The Pennsylvania Stores are not served by private sidetracks. Trucking service is involved there the same as the tobacco stores. They are on the opposite street, and they are the same as the tobacco stores. The range of trucking is 75 to 300 feet.

The Pennsylvania Stores has no private siding or sidetract facilities. Freight to and from the Pennsylvania Stores reaches that warehouse through tracks of the Delaware Avenue Stores. That is, they are placed on those tracks and hauled by motor or hand truck over to the Pennsylvania Stores.

At the Atlantic Stores the merchandise is placed on truck from the Moro Phillips Stores, and trucked by motor truck.

The Tobacco Warehouse, the West India Stores, the Pennsylvania Stores and the Atlantic Stores are all known as part of the Delaware Avenue group.

This freight is not trucked from public delivery tracks to any of these stores instead of the private siding from some other warehouse of the Pennsylvania Warehousing and Safe Deposit Company to my knowledge.

[fol. 466] Such trucking from the Almond Street yards of the Reading Company to any one of these four warehouses has been performed, but not in a long period of time, I should say possibly a year.

Up to about one year ago this freight on which we got an allowance was, in fact, trucked from public delivery tracks to Moro Phillips Stores, Atlantic, West India, Pennsylvania and the Pennsylvania Tobacco Stores. Freight inbound or outbound from these four warehouses, not having direct track connections, also has been motor-trucked to or from public delivery tracks on the Reading Company at Delaware Avenue, outbound that is continued yet today; inbound possibly a year.

The major portion of our inbound tonnage is received from the Reading and Baltimore & Ohio.

A great majority of our tonnage is interstate traffic. We receive allowances on that freight from the Reading and on the B. & O. We receive allowances from the Baltimore & Ohio on both inbound and outbound freight. On the Reading we receive allowances only on the inbound freight.

We ship freight from our various warehouses outbound over the Reading. We do not receive any allowances on the outbound freight.

There is no difference in service that we pefform on the outbound freight that goes out over the Reading Company and the outbound freight over the Baltimore & Ohio.

There are a good many different rates of allowances on the Reading. The rates of allowance given by the Reading Company to the Pennsylvania Warehousing and Safe Deposit Company on inbound traffic are thirty cents per ton on merchandise, with the exception of newsprint paper, which is 15 cents per ton.

The allowance on flour is thirty cents.

[fol. 467] No allowances are given by the Reading Company to the Pennsylvania Warehousing and Safe Deposit Company on outbound traffic.

The rates of allowances given by the Baltimore & Ohio Railroad to the Pennsylvania Warehousing and Safe Deposit Company on inbound traffic are fifty cents per ton on all kinds of traffic. The rates of allowance given by the Baltimore & Ohio Railroad to our Warehouse Company on outbound traffic are fifty cents per ton—it is fifty cents on flour. All kinds of general merchandise and package freight are handled at our warehouses.

I recognize this copy of a trade journal entitled Distribution and Warehousing. I find at page 156 of that publication an advertisement of the Pennsylvania Warehousing and Safe Deposit Company. That was put in in the regular course of business.

Mr. MacGregor is Assistant General Superintendent of the Pennsylvania Warehousing and Safe Deposit Company.

(The witness then identified the signatures of Mr. MacGregor or himself to the letters offered as exhibits 42 to 47 inclusive.)

Referring to Exhibit marked No. 48, and to the names of the Eagle-Picher Lead Company, that appears on that exhibit, the Eagle-Picher Lead Company is one of the customers of the Pennsylvania Warehousing and Safe Deposit Company.

As to whether the other names of firms appearing on that exhibit are also customers of the Pennsylvania Warehousing and Safe Deposit Company, the West Virginia Pulp &

Paper Company are not. Mapl-Flake Mills, Inc., are not. I believe the rest are.

The West Virginia Pulp & Paper Company was at one [fol. 468] time a customer of the Pennsylvania Warehousing and Safe Deposit Company. Mapl-Flake Mills, Inc., was a customer of the Pennsylvania Warehousing and Safe Deposit Company.

I will describe the service performed by our warehouse company for the Eagle-Picher Lead Company:

The cars of lead are placed at our warehouse and unloaded by us; part of it is put in their rented space and part of it is put in open warehouse space. And the part put in open warehouse space is delivered on their order to their teams and taken away in truck loads.

Q. What service does your warehouse perform for the Post Products Company?

A. Unloads the cars—the cars are placed and unloaded in the warehouse; delivered to the trucks or loaded in freight cars on their instructions. When loaded in freight cars, that is for outbound shipments in l. c. l. lots. We receive orders by United States mail, sometimes by telephine, followed by mail, that enables us to make these deliveries or distribution under the contracts.

If you went down this list and asked me the same questions about the other concerns appearing on Exhibit No. 48, my testimony would be of the same character as to delivery or distribution of the freight for those concerns, as my testimony has been for the Post Products Company.

(The exhibits referred to were thereupon offered and received in evidence, marked "Complainants' Exhibits 41 to 48, inclusive, Witness Justice.")

Examiner Brown: In Exhibit 48 it appears that the [fol. 469] points of shipment have not been proved as to being correct for these concerns; so, this exhibit will be received subject to testimony of this witness with respect to points of shipment on this exhibit.

Cross-examination.

By Mr. Stilwell:

Looking at the first page of Exhibit 48 I will say goods from the Coca Cola Company inbound are received by

motor truck. None of these goods is received from the railroads. We do not get any allowance in connection with any products received from the Coca Cola Company.

With respect to the California Packing Company the same thing is true there. Their goods are received by motor truck. They do not come in to us over the railroad.

From some concerns named on that list we receive the freight both by truck and by railroad. There are some that we receive both ways—by truck and by railroad.

On shipments to the Pennsylvania Warehousing and Safe Deposit Company, or in their care, there appears upon the bill of lading, "Care of Pennsylvania Warehousing and Safe Deposit Company," destined to a particular store. The stores designated on these bills of lading are: Delaware Avenue Stores; 16th Street Stores; 23rd Street Stores; Port Richmond Stores; Poplar Street Stores and Moro Phillips Stores. None is ever addressed to the Tobacco Warehouse or the West India Stores, the Pennsylvania Stores or Atlantic Stores. All those stores are separate buildings. They are operated as part of our Delaware Avenue Stores, or as part of our Moro Phillips Stores.

All freight received by us that is at any time placed in [fol. 470] any of the stores I have mentioned, is unloaded at the Delaware Avenue Stores or the Moro Phillips Stores and the address on that bill of lading always specifies in those cases either the Moro Phillips Stores or the Delaware Avenue Stores.

In the so-called Tobacco Warehouse we store imported tobacco. It goes in under United States customs bond. We unload that at the Delaware Avenue Stores and then truck it across Water Street and put it in our tobacco stores under the instructions of the Government inspector.

The Tobacco Stores is a specially constructed building. It is a humidor. It is almost air proof; very few windows which are sealed with shutters and has to be kept absolutely dark, and the humidity has to be kept at a certain degree to preserve this imported tobacco.

When we receive merchandise at the Delaware Avenue Stores, which, according to instructions we have received, is to be delivered or reshipped within 48 hours, we do not transfer any such merchandise to these other buildings other than the tobacco warehouse.

Any merchandise which we transfer from the Delaware Avenue or the Moro Phillips Stores, as the case may be, to some other building, is after 48 hours after arrival with the exception of the tobacco. And except that it is a commodity that we think is going to stay in after the 48 hours, we will truck it before the 48 hours are up; but if we think it is to be taken away, we leave it there.

Where we have received instructions before the time of the arrival of the freight we leave it there. Whenever we move it we believe it is going to be in our storage for a considerable period of time.

[fol. 471] The reason for having the buildings known as Delaware Avenue Stores Nos. 1, 2, 3 and 4; Tobacco Warehouse; West India; Pennsylvania Stores; and Atlantic Stores is principally for the convenience of directing our patrons to them and identifying them for insurance purposes.

These buildings carry different insurance rates.

When I say identifying them to our patrons, I mean telling our patrons where to bring their trucks—where to bring their trucks or the truck driver where to go. They all operate as an operating unit.

In answer to Mr. Hickey's question, I stated that we unloaded these shipments for the customers which he named in his questions; that is not a correct statement. We unload them for the carrier.

Redirect examination.

By Mr. Hickey:

This Atlantic Stores bears the name Atlantic Stores and has ever since I went in the service of the Warehouse Company, and this Pennsylvania Stores bears the name of Pennsylvania Stores and has ever since I have been in the service of the company, and this West India Stores also bears that name and has ever since I have been in the service of the company.

The Tobacco Warehouse has been called the Tobacco Warehouse ever since it was built.

When freight was unloaded from cars on the public delivery tracks and trucked to the Atlantic Stores, it was unloaded directly from the railroad cars on the motor truck, and the motor truck moved directly from the cars to the

Atlantic Stores—and the same is true of the Pennsylvania Stores, the West India Stores and the Tobacco Warehouse. [fol. 472] The checkers or laborers handling freight worked jointly at the Atlantic Stores with the Moro Phillips Stores. They go from one warehouse to another, wherever there is work to be done. They are all under the supervision of one superintendent—the Moro Phillips, Atlantic and West India.

The Pennsylvania Warehousing and Safe Deposit Company operates twenty-two warehouses.

Our Port Richmond Stores and our Poplar Street Stores are not under joint operation. They are all under the supervision of the president of the company. They have their separate office organization, separate foremen and separate laborers. The significance of this claim that there is joint operation of this Delaware Avenue group of stores is that the Delaware Avenue Stores, Pennsylvania Stores and Tobacco Stores are all right within two city block all together; have the one office force; one gang of laborers; and one foreman. They all come under the one office.

Recross-examination.

By Mr. Stilwell:

To the shippers throughout the country these groups are known as the Delaware Avenue Stores and to our local trade and insurance brokers they are known by the respective names and are operated as a group—they are separated only by an alley or street.

When I say we operate twenty-two stores, I include in our 16th street stores several buildings and in our 23rd street stores several buildings.

By Mr. Woodcock:

I spoke of certain shipments which we handled from the [fol. 473] Delaware Avenue team track to our stores. It has been about a year since we handled any shipments from that track. There were peculiar circumstances that required the handling of shipments from that track rather than our siding. Frequently it was on account of shifting service.

We were delayed with shifting, and we would go ahead and unload from the team track.

We would be waiting in the warehouse for cars to be placed on our private siding when the cars would be on the team track or on the tracks outside, and we would know they would have to be trucked anyway, and we would go ahead and truck them before they were actually placed. It was done for the purpose of our own convenience.

JACOB A. GEISZ was thereupon called as a witness on behalf of the complainants, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

My Name is Jacob A. Geisz. I am president of the Philadelphia Warehousing and Cold Storage Company. That warehouse company is engaged principally in the cold storage business. Its general office is at Delaware Avenue and Noble Street, Philadelphia. It operates three houses located at 501 to 518 Beach Street, 512 to 526 Beach Street, in Philadelphia. They have tracks entering the building in both locations connecting with the Reading Company. The major portion of our freight is principally inbound and transported by the Reading Company. It is largely interstate traffic.

We receive allowances from the Reading Company. The [fol. 474] rate of the allowance is fifty cents per ton on dairy products or other perishable goods requiring cold storage. The dairy products are butter, eggs, cheese and poultry. The other goods we receive are meats, fruits, dry and green. We handle only those goods on which we are entitled to allowance.

The aggregates of the allowances paid in recent years were:

For the fiscal year ending March 31, 1926, the Reading Company paid the Philadelphia Warehousing & Cold Storage Company $19,729.39.

For the fiscal year of the storage company, period end-

ing March 31, 1927, the Reading Company paid the storage company $21,908.18.

For the fiscal year of the storage company, period ending March 31, 1928, the Reading Company paid the storage company $20,992.42.

Mr. Hickey also asked, I think, information as to the exact number of cars from April, 1926, to March, 1928. They amount to 7,379.

I might say further that the storage company handles on an average of 3,600 cars every year. Our traffic is largely inbound—very little outbound. About 99 per cent of our traffic is dairy products. 80 per cent of the dairy products are removed from our warehouse within the free time.

I will briefly describe the service we perform on these inbound shipments:

We are furnished a list by the Railroad Company each day of the cars that we are to unload, and when we receive these cars we get in touch immediately with the consignees and notify them by phone and follow that message by the delivery of the freight and delivery notice.

We do not distribute the freight except in one case; we notify the different parties who are to get the goods and the [fol. 475] parties call at the warehouse and we get a receipt for the commodities.

The one exception, the name of that party is the De Sota Creamery Company. They are inbound shipments of butter, and of course, that is a car load shipment. We deliver it to different parties who make up the respective orders. Then several parties may call and each of those parties get a car load of butter of the De Sota Creamery Company, for which we make a charge of $5 a car.

[fol. 476] Our business is purely warehousing and not distribution.

Q. Do I understand that each carload of butter or each carload of eggs that goes into your warehouse, you deliver that lot of freight intact to one person?

A. That has never been done since I have been in the business.

Q. Instead of delivering these dairy products to one person you deliver them to several persons, is that true, when they call for them with orders from the owners of the freight?

A. We honor the orders as they call for them. It might be a truck load or it might be 5 cars of eggs; it might be 10 tubs or 10 firkins of butter. Whatever they call for and have written orders from the owner, we honor the order and give them the quantity of goods called for in the order.

Mr. Hickey: If the Examiner please, I have three exhibits here (producing same).

Mr. Connelly: Which we admit to be correct as far as the Philadelphia Warehousing & Cold Storage Company is concerned.

Mr. Hickey: We offer these three in evidence.

Examiner Brown: Any objection? From what source was Exhibit No. 49 taken?

Mr. Hickey: Exhibit 49 is reproduced from a publication of the Philadelphia & Reading Railway Athletic Association, an annual publication for the year 1927.

[fol. 477] Examiner Brown: These exhibits will be received.

(The exhibits referred to were thereupon received in evidence marked Complainants' Exhibits 49, 50 and 51, Witness Geisz.)

Cross-examination.

By Mr. Connolly:

I said our terminal charge is 50 cents per ton on dairy products and 30 cents per ton on general merchandise.

(Witness excused.)

COLLOQUY

Mr. Hickey: If the Examiner please, the remaining evidence I desire to offer is documentary evidence which I believe I can get in with the help of counsel and stipulation of counsel.

Mr. Webber: That is correct as far as I am concerned.

Mr. Woodcock: All right, so far as the Reading is concerned.

Mr. Hickey: I offer a statement of bills of the Pennsylvania Warehousing and Safe Deposit Company for allow-

ance under consideration in this case which has been reproduced from the records of the Baltimore & Ohio Railroad Company.

Examiner Brown: That will be Exhibit No. 52.

(The statement referred to was thereupon received in evidence, marked "Complainants' Exhibit 52, Counsel Hickey".)

[fol. 478] Mr. Hickey: Now, Mr. Webber, have you produced some of the way bills which I called for?

Mr. Webber: I have, sir. I haven't those in the form for exhibits, but I have them so that you can see them. (Producing same.)

Mr. Hickey: We will not offer these in exhibit form. I would like to stipulate with Mr. Webber that the way bills which he has produced contain columns under the heading "Consignee. Address, (Final destination, and Additional Routing)."

Examiner Brown: You make that stipulation, Mr. Webber?

Mr. Webber: Yes, sir.

Mr. Hickey: And that the character of billing shown by the various way bills that Mr. Webber has produced is the name of some person under that column followed by the inscription "Care of the Pennsylvania Warehousing and Safe Deposit Company" or an abbreviation of that name?

Mr. Webber: That is right, sir.

Mr. Hickey: I now desire to stipulate in the record some documentary evidence produced from the files of the Reading Company. First, the contracts or agreements between the Reading Company and the Pennsylvania Warehousing and Safe Deposit Company?

Mr. Woodcock: There are four contracts with certain letters or copies of letters attached thereto. I also have photostatic copies, which I have produced in answer to Mr. Hickey's request.

The first contract is dated January 12, 1897, between the Philadelphia & Reading Railway Company and the Pennsylvania Warehousing and Safe Deposit Company. (Producing same.)

Examiner Brown: That will be identified as Exhibit 53.

[fol. 479] (The agreement referred to was thereupon marked "Complainants' Exhibit 53, Counsel Woodcock" for identification.)

Mr. Woodcock: Also agreement between the Philadelphia and Reading Railway Company and the Pennsylvania Warehousing and Safe Deposit Company, dated December 12, 1901. (Producing same)

Examiner Brown: That will be identified as Exhibit No. 54.

(The exhibit referred to was thereupon marked "Complainants' Exhibit 54, Witness Counsel Woodcock" for identification.)

Mr. Woodcock: And also agreement dated January 2, 1902, between the Philadelphia & Reading Railway Company and the Pennsylvania Warehousing and Safe Deposit Company.

Examiner Brown: Identified as Exhibit No. 55.

(The agreement referred to was thereupon marked for identification "Complainants' Exhibit 55, Counsel Woodcock".)

Mr. Woodcock: Also agreement dated January 25, 1905, between the Philadelphia and Reading Company and the Pennsylvania Warehousing and Safe Deposit Company, which agreement is a modification of the agreement introduced dated January 2, 1902. (Producing same)

Examiner Brown: That will be marked Exhibit 56.

(The supplemental agreement referred to was thereupon marked "Complainants' Exhibit 56, Counsel Woodcock" for identification.)

Mr. Woodcock: Also agreement dated November 4, 1898, between the Philadelphia & Reading Railroad Company and the Philadelphia Warehousing and Cold Storage Company, to which there is attached a supplemental agreement, dated April 20, 1909, between the same parties (producing same).

[fol. 480] Examiner Brown: That will be identified as Exhibit No. 57.

(The agreement referred to was thereupon marked for identification "Complainants' Exhibit 57, Counsel Woodcock".)

Mr. Woodcock: Now, to all these agreements, as I stated before, there are certain letters attached.

Examiner Brown: That is understood.

Mr. Woodcock: I also wish to stipulate if Mr. Hickey is agreeable to it, that the Reading Company has succeeded to the rights of the Philadelphia & Reading Railway Company under all of these agreements. The Philadelphia & Reading Railway Company having been merged with and became a part of the Reading Company since January 1, 1924, the thing I wish to stipulate is that the Reading Company has succeeded to the rights and obligations of the Philadelphia & Reading Railway Company under these agreements.

Mr. Hickey: I agree with that.

Counsel for the Reading Company has, in response to my request, passed to me, a bill of the Pennsylvania Warehousing and Safe Deposit Company, presented to the Reading Company under date of May 29, 1926, for the allowances under consideration in this case. It bears the number 33,575. I will read what appears upon that bill:

"To tonnage due at the Port Richmond Stores for the month of May, 1926"

The inscription which I read was from one bill of the Warehousing Company for one of its warehouses, and I would like to stipulate with counsel that it is typical of all bills of the warehousing company for the allowance claimed at all of its warehouses.

[fol. 481] Examiner Brown: You are referring to the Reading Company now?

Mr. Hickey: Yes, sir.

Examiner Brown: Is that satisfactory to you, Mr. Woodcock?

Mr. Woodcock: I agree that the description read by Mr. Hickey is typical of that in the bills covering such claims which are presented by the Pennsylvania Warehousing and Safe Deposit Company.

Examiner Brown: The stipulation will stand as stated.

Mr. Hickey: I also would like to stipulate with counsel for the Reading Company the description of the allowances as claimed by the Philadelphia Warehousing and Cold Storage Company, from the Reading Company.

For that purpose I have before me a bill of that Ware-

housing Company, for the week ending May 1, 1926. I will read from that bill as follows:

"Deliveries made for week ending May 1, 1926."

I would like to stipulate with counsel for the Reading Company that that is typical of other bills for allowances presented by that Warehousing Company to the Reading Company.

Mr. Woodcock: I agree that the words read by Mr. Hickey are contained in the standard form of bill which is presented to the Reading Company by the Philadelphia Warehousing and Cold Storage Company for allowances, so-called, under its contract.

Examiner Brown: The stipulation will stand.

Mr. Hickey: In my letter of July 21, 1928, addressed to Mr. W. L. Kinter, General Solicitor Reading Company, I asked for the production of certain revenue way bills. Counsel for the Company has certain of these revenue way [fol. 482] bills, and they are before us now.

I now ask Mr. Woodcock, whether he has such way bills before him?

Mr. Woodcock: I have 501 way bills, which are the way bills covering the shipments referred to in Mr. Hickey's letter, and I find in these way bills that one general form of billing was used, that is, under the printed caption appearing on each of the way bills, reading:

"Consignee; address; (final destination and additional routing") appears the name of some party other than the Warehousing Company followed by the words, "Care of Pennsylvania Warehousing and Safe Deposit Company" and followed by the name of some particular store of that company, such as the 16th Street Stores and the address of that particular store.

In some cases the words "Pennsylvania Warehousing and Safe Deposit Company are abbreviated; but the words "Care of" appear in all of the 501 way bills which I have produced in answer to Mr. Hickey's call.

Mr. Hickey: I agree that counsel has correctly stated the writings that appear on these bills.

Examiner Brown: The stipulation will stand.

Mr. Hickey: Will counsel for the Reading Company state the total amount of the allowances given by the Reading

Company by the Pennsylvania Warehousing and Safe Deposit Company during one or two recent years?

Mr. Woodcock: I am advised by a representative of our Comptroller's Office, who is present, that the total amount of payments made under the contracts in question to the Pennsylvania Warehousing and Safe Deposit Company by the Reading Company for the year ending April 30, 1927, amount to $31,386.32; and that such payments for the year [fol. 483] ending April 30, 1928, amounted to $27,909.78.

Mr. Hickey: If the Examiner please, I would like to have stipulated for the record, without calling for witnesses, the correctness of that statement?

Examiner Brown: It is considered as part of the evidence in this proceeding, without objection, as an admission of counsel.

Mr. Hickey: That concludes the stipulation with the Reading Company. I now return to the Baltimore & Ohio matter.

I will endeavor to stipulate in the record a description of the allowances as claimed by the Pennsylvania Warehousing and Safe Deposit Company from the Baltimore and Ohio Railroad Company.

I have before me such a statement produced by counsel of the Baltimore & Ohio.

It is a bill of the Pennsylvania Warehousing and Safe Deposit Company, presented to the Baltimore & Ohio Railroad Company, bearing date of May 10, 1928, and I will read the following therefrom:

"To tonnage due at the Delaware Avenue Stores for the month of April, 1928."

I would like to have counsel for the Baltimore and Ohio state if that is typical of the description of the allowances as claimed by the Warehouse Company in its various bills throughout the past two years?

Mr. Webber: My examination of the records, which I have obtained from the Accounting Department, shows that this is typical of the bills presented to the Baltimore and Ohio Railroad by the Pennsylvania Warehousing and Safe Deposit Company.

Examiner Brown: It will be considered as a part of this record.

[fol. 484] (The exhibits referred to, heretofore marked for identification, were thereupon received in evidence, marked "Complainants' Exhibits 52 to 57 inclusive".)

Examiner Brown: You have no further evidence at this time, Mr. Hickey?

Mr. Hickey: No. Complainants rest.

Examiner Brown: Normally, the defendants would be expected to put their case in at this time, but discussions off the record were had to the effect that an adjournment is necessary in this case.

I understand that Mr. Hickey and the various counsel here present have agreed that the case may be adjourned until October 8, 1928.

Examiner Brown: There being nothing further at this time, the hearing will stand adjourned until October 8, 1928, at 10 o'clock a. m.

Thereupon, at 3:55 p. m. on August 1, 1928 the hearing was adjourned.

Philadelphia, Pa.,

October 8, 1928—10:00 o'clock a. m.

Before R. M. Brown, Examiner.

Met pursuant to notice.

Mr. Bikle: Before calling the witness, I should like to move that the Commission rescind its order of September 17, 1928, permitting intervention on behalf of the Millers National Federation. That intervention was granted, as is customary with the Commission, ex parte. The testimony introduced at the prior hearing disclosed, I think, the in-
[fol. 485] terest of the intervener in the case—that is, that intervener in the case, and I do not think it is relevant to the issues.

Mr. Campbell: I make a formal objection.

Mr. Glasgow: On behalf of the interveners I make the same motion as Mr. Bikle.

Mr. Woodcock: I make a similar objection to the allowance of the petition in Sub No. 2.

Mr. Barnes: And the same on behalf of the intervener, Pennsylvania Warehousing & Safe Deposit Company.

Mr. Webber: Same for the Baltimore & Ohio Railroad Company.

Mr. Campbell: On behalf of the intervener I oppose that motion. Exam. Brown: Inasmuch as that petition has been received and allowed by the Interstate Commerce Commission, and inasmuch as it is understood that this petition will not unduly broaden the issues, I will make no ruling on it at this time. The ruling with respect to this petition will be made in the final analysis by the Commission.

EDMUND FUNCK was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bikle:

I am assistant general freight agent of the Pennsylvania Railroad Company. I have been connected with the traffic department of the company for 28 years. My present duties are specifically the handling of complaints before the Interstate Commerce Commission, both formal and informal, and also before the various state commissions, as well as various matters relating to rate adjustments.

[fol. 486] I have been assistant general freight agent for a year and a half, but I have been in that line of work since 1916.

I have prepared a map (Exhibit 58) showing the city of Philadelphia, for the purpose of indicating on it the location of the stations of the Pennsylvania Railroad Company, including, as we think, the warehouses that have been the subject of discussion in this proceeding. The map as printed, is a map of the city of Philadelphia, prepared by the Pennsylvania Railroad, for our own use in various matters, and it is, I think, an accurate map of the city. Then under my direction I had placed on this map, by letters in circles, the location of certain Pennsylvania Railroad operated freight stations; then following, locations of those warehouses with which we have the agreements that are already in evidence in exhibit 1.

When I hereafter use the phrase "contract warehouses," I have in mind warehouses with which there are contracts, now in evidence.

Examiner Brown: As I understand exhibit No. 58, it is merely for convenient reference.

Mr. Bikle: That is what you asked us to give you, Mr. Examiner, a map showing the location of these points.

The Witness: Just for clarity, the contract warehouses are those designated by the numerals 1 to 11, and the complainant warehouses by numerals 12 to 15, inclusive, in a circle. These contract warehouses that I have referred to, as indicated by the circles 1 to 11, inclusive, are in relation with the Pennsylvania Railroad Company, by virtue of the [fol. 487] contracts that are already admitted as exhibit 1.

The contract (exhibit 1) which is marked in pencil 1 and 2, covers the warehouse designated on the map, 1 and 2 being River Front Stores, and Webb Terminal.

I have put on the various contracts that are bound together as exhibit 1, pencil notations that correspond with these red numerals in circles here so that it is only necessary to say that they have already been identified in that fashion to tie up with the notations on this map.

The contract dated the 25th of January, 1917, covers River Front Stores and Webb Warehouse, which are designated as Nos. 1 and 2, on exhibit No. 58.

The contract dated the 28th day of July, 1927, covers Franklin Warehouse, designated circle 3 on exhibit 58.

The contract dated 10th day of April, 1922, covers Bainbridge Warehouse, designated as circle 4 on exhibit 58.

The contract dated 4th day of March, 1925, covers Kenilworth Warehouse, designated circle 5 on exhibit 58.

The expired contract, dated 3rd day of July, 1918, covers Federal Warehouse, being designated circle 6.

The contract dated 1st day of July, 1916, covers Shackamaxon Warehouse, being designated circle 7.

The contract dated 1st day of July, 1916, covers Kensington Warehouse, being designated circle 8.

The contract dated 1st day of July, 1916, covers 15th and Carpenter, being designated circle 9.

[fol. 488] The contract dated 1st day of July, 1916, covers 31st and Chestnut Streets, being designated circle 10.

The set of letters commencing with 1, dated September 8, 1922, signed Quaker City Cold Storage Company, Horace

P. Searle, President, cover Quaker City Cold Storage Company, being designated No. 11 on the exhibit.

With respect to No. 10, all sorts of general merchandise is delivered at these warehouses.

However, with respect to Shackamaxon and Kensington, they handle flour in considerable quantities, and that is also true with respect to 31st and Chestnut Streets.

We have no contracts with the warehouse under the heads of 12, 13, 14 and 15. They are complainants in this case.

At 31st and Chestnut Streets, there is also handled a considerable quantity of hay. None of these warehouses handle household goods or second-hand furniture. The best designation is that they handle general merchandise.

The warehouse of the Quacker City Cold Storage Company, designated circle 11, handles various commodities which require cold storage. For example, they handle dressed poultry, meats, citrus fruits, certain kinds of fresh vegetables, certain kinds of groceries, certain kinds of vegetable oils, buttermilk in barrels, frozen fish, butter and cheese and in general commodities which require refrigeration. Those are the only special situations that it is necessary to describe, in my judgment.

The Pennsylvania Railroad Company has a so-called station tariff. The current tariff is G. O. I. C. C. 14700. I [fol. 489] have prepared an exhibit showing excerpts from that tariff, relating to these warehouses, designated 1 to 11, which is embodied in exhibit 59. Just for clarity, sheet 4 of that exhibit covers the current situation. The preceding sheets are entirely historical.

I have also prepared an exhibit, showing excerpts from our tariff No. 14322, relating to storage rules, which is No. 60. I have included that because of reference to these warehouses.

The general arrangement with respect to the loading and unloading of caroad freight, carried at carload rates on the railroads of this country is that the consignee or owner shall load or unload. That rule has already been incorporated in the record in one of Mr. Hickey's exhibits—No. 33. There are various exceptions to that rule.

I have prepared an exhibit, showing an excerpt from the Pennsylvania Railroad tariff containing exceptions to the

Official Classification, and particularly to Rule 27, as applicable to Philadelphia (Exhibit 61).

I have prepared an exhibit showing the history of the allowances that are paid to warehouse companies designated 1 to 11—that is my exhibit No. 62. It shows an increase in the allowance to some of the older warehouses with which we had contracts prior to 1925. I think it is necessary to refer to the exhibit in order that this may be clearly understood.

By reference to the exhibit (62), it will be noted that in the first group of warehouses and the allowances shown, the allowances are either 40 or 35 cents per ton respectively. The allowance originally was 40, and in many cases the contracts provided that after a certain period of time, [fol. 490] there would be a reduction to 35 cents.

Just at this point I may say I am speaking of merchandise freight, because the allowance with respect to flour in barrels has not changed.

Now taking page 1 of the exhibit, and taking the very first group of warehouses covering River Front stores, it will be seen that the allowance is 40 cents.

In the Kensington district, second group, 35 cents.

15th and Carpenter, 35 cents.

Delaware Avenue, Walnut-Chestnut Street, 40 cents, and then there was an addition, effective January 1, 1917, Federal Street, at 35 cents.

Now in the next group, at the bottom of the page, it will be seen that the group covering Delaware Avenue, Water, Chestnut and Walnut Streets, the River Front Stores group was increased to 50 cents per ton.

Then turning over to page 2, it will be seen at the top of the page, covering the first group, and specifically Kensington and Shackamaxon warehouses, that effective on the same date, namely, June 23, 1919, the allowance was made 50 cents per ton, and similarly with regard to 15th and Carpenter Streets, the amount was made 50 cents per ton.

That is the increase that I desire particularly to explain. As I have already stated, the allowance at these warehouses was generally 35 cents per ton. The Merchants Warehouse Company took up with our company the question of having the allowance increased, and our vice president declined to grant that increase.

Mr. George D. Dixon was then vice president. The president of the Merchants Warehouse Company thereupon said [fol. 491] that for the time being he would let the matter rest, although he contended it cost him much more to handle the traffic than the allowance he was receiving.

As I have stated, and as shown by the exhibit, the original allowance continued until June 22, 1919, inclusive, but on that date, it was advanced to 50 cents, and the reasons for the conditions covering that advance are shown by the correspondence which has been filed as exhibit No. 63.

At the time of that advance the Pennsylvania Railroad Company was being operated by the Director General. The advance was required by Mr. O. H. Markham, the Regional Director of the Allegheny Region, in which the Pennsylvania Railroad at that time was located.

The officer in the Railroad Administration at that time who had immediate contact with this problem at Broad Street was Mr. Charles R. Capps. I know him personally. I was employed by him. He had no prior connection with the Pennsylvania Railroad Company before the Railroad Administration—he has had none since.

He was sent to Broad Street to have charge of the traffic of the Allegheny Region.

Mr. Hickey: If the Examiner please, if we are going into this thing in detail, I am going to insist on there being produced here the things that were laid before Mr. Capps and Mr. Markham that brought these stereotyped letters here.

Examiner Brown: The opinion of the Examiner is that this testimony, while relevant, is not particularly important.

Mr. Bikle: That is the way I think, Mr. Examiner, but what we did want you to be cognizant of was that the in- [fol. 492] crease made in 1919 was made by high officials of railroads that had no prior relation with this situation.

Mr. Hickey: That is the very thing I object to, if the Examiner please, the treating of that Railroad Administration as an instrumentality of the United States Government, and we all know perfectly well what the Railroad Administration was; that the government had to take and organize the Railroad Administration out of these railroad officials, and that in these cases, time and time again, the tongues of the Railroad Administration were portrayed as the tongues of the United States Government, while in fact they were just the tongues of this Railroad Adminis-

tration. We all know what they were and how it was done.

Examiner Brown: I am going to let this evidence in for what it is worth, and subject to the remarks of counsel.

Proceed.

The Witness: Mr. Markham, whose name is shown on one of these letters, had no relation whatever to the Pennsylvania Railroad Company prior to Federal control and has had none since. He is the gentleman who was president of the Illinois Central Railroad Company.

Exhibit 64 relates to the same general matter. It was somewhat misunderstood this morning, in being enumerated—what is called the Freight Rate Authority, which was issued by the United States Railroad Administration during the period of Federal control, was the authority under which the Pennsylvania Railroad published its tariff, showing the increase.

Mr. Campbell was an official of the Pennsylvania Railroad Company at no time. He is the present vice presi-[fol. 493] dent of the New Haven, in charge of traffic.

Reverting to the exception to the classification which is shown on my exhibit 61, the Pennsylvania Railroad Company in Philadelphia, at some of the stations operated with its own immediate employes, unloads carload freight. I have made an investigation to enable me to give some idea of the extent to which that kind of unloading is performed. Confining myself, of course, to the stations involved in this exception to the classification, and to package freight, I had an investigation made for the period of the week of June 25th to June 30, 1928, inclusive. That week was selected for no particular reason. It was immediately in advance of the hearing in July, and I took the current week, in order that the data might readily be procured, and the situation with respect to the traffic unloaded at these stations, or loaded by the Pennsylvania Railroad Company, is as follows, in cars:

At Dock Street, inbound, 24 cars unloaded; outbound, 10 loaded.

Walnut Street, inbound, 50 unloaded; outbound, two loaded.

At Federal Street, inbound none and outbound, 3.

At Shackamaxon station, inbound none; outbound, two.

At Kensington, inbound two; outbound, 11.

At North Philadelphia, none.

At Broad Street and Washington Avenue, inbound none; outbound 12.

At Vine Street, inbound six; outbound five.

At 30th and Market Streets, none in either direction.

Ontario Street, none in either direction.

Fair Hill, inbound none; outbound, three.

[fol. 494] I think that is typical of the situation at those stations. The week was just a normal week, and the results would perhaps be the same at any other time.

I have made an effort to ascertain what was the occasion for the railroad assuming this work of loading and unloading certain carload freight at Philadelphia. I have not, from any records, been able to get complete information, but I have ascertained some facts as the basis for conclusions. I think perhaps it might be well to know the source of my information. There are, as I have already stated, no written records on the subject, but I have discussed the matter with a number of our older employes, with one who was our division freight agent at Philadelphia about 30 years ago, and who is now pensioned, and with our pensioned vice president, Mr. George D. Dixon, who was located in Philadelphia at about the time we assumed this practice started.

In order that it may be understood, I should like to point out, first of all, that we have in Philadelphia, two stations, namely Dock Street and Walnut Street wharf at which we have no team track delivery.

Walnut Street wharf, as its name implies, is a pier station, and traffic to and from that station is floated by car float from our Camden terminal.

Dock Street is just across the street from Walnut Street wharf, and we might designate it an inland station, there being no team track there. The station is, however, reached by a track which enters the station building from the south side.

Now I think it will be obvious to most any one that at [fol. 495] those stations it is necessary, because of the physical characteristics of the stations, for the Pennsylvania Railroad Company to load and unload carload traffic. Obviously we cannot let the consignee go into the cars through our stations, so that with respect to those stations the situation was and is entirely physical.

They are old stations. Both of those stations were taken over by the Pennsylvania Railroad Company from the United Railroad of New Jersey, by a lease of June 30, 1871, the arrangement becoming effective, that is, the Pennsylvania Railroad operation becoming effective July 1, 1871.

Now with respect to the other stations that do have team tracks, I cannot state any date on which the arrangement became effective there, but as closely as it can be determined, it must have been in the early nineties, and we should bear in mind there that certain of these stations, for example, Vine Street and Dock Street and Walnut Street wharf, are along the water front. They are in proximity to the steamship companies that now enter Philadelphia, and they were in proximity to the piers of the lines that entered Philadelphia some years ago.

I have reference as to the past, to the old Windsor Line that operated between Philadelphia and Boston, the M. & M. T. Company that operated between Philadelphia and the south, and still does; the Clyde Line which formerly operated between Philadelphia and New York.

Of course, because of the physical situation, the steamship companies must unload their traffic, either carloads or less, on their steamship piers, so that the Pennsylvania Railroad Company had definite competition at that time [fol. 496] and still has today, which it had to meet, and that I think is one of the reasons that led to the inception of it.

I think it should be made clear that this is not something which started over night. It apparently grew, and so far as I am able to determine, it started with commodities such as canned goods, dried fruits, nuts and other Pacific Coast traffic—that is, traffic that might come in by water and might also come in by rail, and gradually spread to other commodities.

Now by reference to the list it will also be noted that there are included certain stations that are not waterfront stations. As an illustration, ~~30th and Market~~, Fair Hill and North Philadelphia, and from my investigation with respect to those stations, I am led to believe that the spread to those stations was made because of the fact that in some instances they were at least reasonably contiguous to the others named—and I mean by that, Broad Street and Washington Avenue, would be roughly 14 blocks from the waterfront,

while the other stations are as a matter of fact intermediate to the waterfront stations. By the intermediate stations I have reference to North Philadelphia, 30th and Market, and so it will be seen that starting with the waterfront, the arrangement gradually spread to these stations located in various parts of Philadelphia proper.

It does not go to such outlying stations as points on our Chestnut Hill branch, or points in the far portions of West Philadelphia. Of course, it does go to North Philadelphia. That is the sum and substance of what I was able to develop from a historical point of view.

[fol. 497] Q. Now, Mr. Funck, the evidence shows that the company has made these contracts with certain contract warehouses, as indicated in exhibits 1 and 58. Will you kindly state what work the contract warehouses do for the railroad company in fulfillment of such obligations as they assume in those contracts. I am not asking you to recite what is in the contracts, but only what they do?

Mr. Hickey: First, I have an underlying objection. Mr. Funck is qualified as assistant general freight agent of the Pennsylvania Railroad, and my picture of that is he occupies an office over in the Broad street station. Now this question apparently invites Mr. Funck to tell just what services certain warehouses of the Merchants Warehouse Company performed on certain shipments on the 1st day of January, 1928, and at various other times. So far as I have observed, he has no qualifications that will enable him to describe that service.

Mr. Bikle: Have you had any first-hand examination of those companies, Mr. Funck—I mean those warehouses?

The Witness: I went around to see all of them personally.

Examiner Brown: To see the warehouses?

The Witness: To see the warehouses, but I did not enter more than three of them.

Mr. Hickey: May I ask my opponent to establish the date that Mr. Funck made his visits to the warehouses?

The Witness: I am reasonably certain it was on July 9th. It may have been July 16th, 1928. Then last Tuesday, with respect to certain of the same warehouses, I made a repetition visit, covering those along the Delaware Avenue waterfront. That was about October 2nd, 1928.

[fol. 498] By Mr. Bikle:

Q. But, Mr. Funck, you have made a study of the situation from reports and documents and conversations with people that were charged with those duties, and made these inspections to confirm that, and that inspection is not the sole basis of your testimony?

A. That is correct, sir.

Examiner Brown: Do I understand Mr. Hickey to object to the witness testifying in this respect?

Mr. Hickey: No, I am not objecting.

Q. What do these warehouses do under their contracts with the Pennsylvania Railroad Company?

A. The traffic is placed by the Pennsylvania Railroad on a warehouse track, which may be adjacent to the warehouse, or it may be a track which enters the warehouse. As illustrative of the first type, I can just take Shackamaxon and Kensington. As illustrative of the second type, River Front Stores and Webb Terminal.

The warehouse employes then handle the traffic by truck—that is, by hand truck, manual labor from the car and place the merchandise at some location in the warehouse. I do not know in what location they place it—that is, the warehousing—that is a warehousing proposition.

With respect to the traffic handled by the Quaker City Cold Storage Company, if it is to be delivered within the 48 hour free period of time, it is generally placed by them on the first floor of the warehouse, so as to be readily accessible for delivery.

They get it there in the same manner, by railroad track in the warehouse, the traffic being unloaded from the car into the warehouse by the employes of the cold storage company.

[fol. 499] The notice of arrival, which is a railroad form, is turned over to or is available to the warehouse company. When I say warehouse company, I am always including the Quaker City Cold Storage Company. The warehouse company gives notice of arrival covering the arrival of the shipment to the person that is named on the billing.

I have shown in exhibit 80 the forms of shipping documents that are used in connection with freight moving over our line. That covers also traffic that is consigned for delivery at the contract warehouses.

The block in which you would find the name to which the notice of arrival would be sent would be the fifth block from the top on the left hand side, containing the words "Consignee, address (final destination and additional routing)."

I have named two services that the contract warehouses perform under their contracts with the railroad. First, to unload freight, and second, to send out notice of arrival. They also receive freight at those points for outbound movement. In that event they load the traffic into the car in the same manner, that is by truck or manual labor, in order to make the customary carload shipment there for outbound movement.

On the inbound traffic delivered at the warehouses of the Merchants Warehouse Company, the railroad generally collects the freight charges on the traffic consigned to those consignees who are on our so-called credit accommodation list. With respect to the consignees who are not upon that credit accommodation list, the warehouse company may collect it. They are held responsible for it under the contract, or the railroad company may collect it.

[fol. 500] I have made an examination to find approximately the percentage of the freight charges on the traffic that is delivered at the warehouses, that is collected direct by the railroad from the consignee.

This investigation covers the period September 1st to September 22, 1928, and with respect to traffic passing through the Merchants Warehouse and taking it in terms of carloads, the railroad company collected 95.11 per cent of the freight charges, and the contract warehouse 4.89 per cent. In terms of dollars, the railroad company collected 93.90 per cent and the warehouse company 6.10.

When I give those percentages of 95.11 and 93.90, I mean that the railroad collected those from other sources than through the warehouse—direct from the persons that are interested in the traffic—so that as regards those charges, the warehouse company did not make collections for us, so it is only on a small percentage that they do.

Examiner Brown: I will ask the witness if he is testifying now with respect to facts within his own knowledge, when you stated that the warehouse company collects a certain percentage of these freight charges. Are those facts within your own knowledge?

The Witness: I think I can best answer your question by stating how I got them. I had our treasurer keep a record for the period that I have mentioned, namely, September 1st to September 22nd, inclusive, just what did happen with respect to inbound shipments during that period.

Mr. Hickey: Now if the Examiner please, all that will show is that the warehouse company paid the Pennsylvania Railroad on this alleged four per cent, and that the Pennsylvania Railroad Company collected freight charges from some one else on the other.

[fol. 501] Mr. Bikle: They did that on traffic that was consigned to people care of the warehouse, so that in line with Mr. Hickey's own witness, it is simply the same situation as he developed, that the warehouse does not pay these sums on its own account.

Mr. Hickey: I want to make it clear what my objection was. The way this witness left it was that on this four per cent the warehouse company collected freight charges. I have no objection to that. It can collect freight charges pursuant to its private warehouse business, all it wants to. I do not think that is pertinent to this case. That is the way the witness left it, but in Mr. Bikle's question he put it differently.

He said that the warehouse company collected this four per cent of freight charges for and on behalf of the railroad company, and I say there is no evidence before you that that was done. When he tried to get it out of the evidence, I objected to the witness testifying along those lines, and asked that the billing be brought in and the documents for the actual transactions be brought in, so that we could determine and have some opportunity to determine whether it was merely the case of the warehouse company paying the Pennsylvania Railroad freight charges that it is legally obligated to pay, paying the Pennsylvania Railroad Company its own freight charges on its own shipments, which is entirely different from this suggestion of Mr. Bikle that it is collecting those freight charges from some one else, for and on behalf of the Pennsylvania Railroad, and then paying them over to the Pennsylvania Railroad.

I say there is no evidence of that, and I want the actual documents here, if we are to go into that.

Mr. Bikle: All of my questions here have been directed [fol. 502] to pointing out what the warehouse company is doing for the railroad company.

Examiner Brown: That is what we want, the facts, if the witness knows and can answer, and my ruling is that he may do so, his testimony in that respect to be received subject to Mr. Hickey's objection.

By Mr. Bikle:

Q. What percentage of this money does the warehouse company collect for the account of the Pennsylvania Railroad Company, in accordance with the contractual stipulations?

Mr. Hickey: I object to that question. The subject is not a proper subject for opinion evidence.

Examiner Brown: I think my ruling covered that, Mr. Hickey.

The Witness: 6.10 per cent.

I was talking a little while ago of the service performed by the warehouse companies,—the contract warehouses for the Pennsylvania Railroad Company. The answers so far as I gave them relate to the Quaker City Cold Storage as well as to the Merchants Warehouse Company; the same general situation prevails there.

I stated in my testimony that there were only certain commodities that are covered by the tariff that relates to the Quaker City Company, so far as this unloading privilege is concerned. The limitation is this: The claimant is confined to butter, eggs, cheese and dressed poultry. As a matter of fact, it is my understanding that the Quaker City Company does not—has not up to the present time handled eggs. The allowance is restricted in that manner, because when it was first made to the Quaker City Company, effective in 1922, the entire arrangement was instituted because we found we were losing certain traffic, and especially these [fol. 503] particular commodities, because of the fact that we had no facility in the vicinity of Dock Street where the produce of the city is very largely delivered, and in many cases the traffic was being routed by us via Harrisburg and the Reading Company. What I mean is we turned it over to the Reading Company at Harrisburg, in order that they might make delivery in the city of Philadelphia, even

though the shipper did not prescribe that terminal service by the Reading.

Now that condition continued, and as a result of that, this arrangement was made with the Quaker City Cold Storage Company in order that we might participate in the traffic.

Now if I may recur for a moment to my testimony as to the various contracts, I stated that the written contract included in exhibit No. 1 that covers the warehouse that on my exhibit 58 is designated 6, has expired, as indicated by memorandum thereon.

So far as I have been able to determine, no changes have occurred in the handling of traffic at that warehouse, or the payment of allowances on traffic delivered at that warehouse, since the expiration date.

I have made an investigation to determine to what extent, if at all, the rates were affected by this service of unloading and loading that was established in the past at Philadelphia. In order to show that situation, I have examined a number of our tariffs, going back as far as the year 1886, and I will attempt to show by these copies of tariffs that have been filed as exhibits, and accompanying rate statements, that the same rate applied to all Philadelphia stations, regardless of whether we did or did not unload carload package freight at those stations. And the same thing is true with regard to the contract ware-[fol. 504] houses, and I have a series of exhibits which I think show that.

The first exhibit, No. 65, is an extract from the Pennsylvania Company's eastbound tariff No. 8, and that tariff at the present time is generally referred to as the Eastbound Guide Book. By reference to the second page of the exhibit, it will be noted that at the bottom of the page there are set forth certain Philadelphia deliveries, and that continues on the next page. Those deliveries include various stations, and that indicates that regardless of the individual station in the city of Philadelphia that was involved, the Philadelphia rate applied there. I may say just in passing, that there is nothing on this extract of the tariff which I have filed which states in plain English that the Philadelphia rates applied. That was before the days of tariff circular 20-A, and the compiler of the tariff simply assumed that when he said Philadelphia deliveries, that

meant Philadelphia rates. That condition will be corrected in the next exhibit.

The next exhibit, No. 66, is a similar extract, effective June 2, 1894. It will be noted that on the second and third pages of the exhibit, and continuing to the fourth page, certain Philadelphia deliveries are set forth, and on the last page of the exhibit it will be seen that under Philadelphia stations a provision was made for the application of Philadelphia rates.

Now the significance of this exhibit is that all of these Philadelphia stations took the Philadelphia rate basis, regardless of whether they were in the center of the city where we unloaded the carload package freight, or whether they were on the outskirts of the city.

We did not unload the carload package freight at all the stations at that time.

[fol. 505] Exhibit 67 simply carries the same sort of story forward, the issue being effective April 1, 1896, and I think I need not repeat what I said with regard to exhibit 66, because the situation is the same.

Examiner Brown: Were either of the tariffs represented by exhibits 65 and 66, filed with the Interstate Commerce Commission? There is no I. C. C. number on either one of them—if you know.

The Witness: There is nothing to indicate it, sir, but I am certain that No. 66 was filed with the Interstate Commerce Commission.

Examiner Brown: How about 65?

The Witness: I think the same answer applies with regard to that tariff.

Now turning to exhibit 68, this exhibit shows the same picture, but going westbound. Now the other exhibits up to this time have been eastbound.

Exhibit 68 is a portion of the Pennsylvania Railroad tariff I. C. C. G-507, applying to Central Freight Association territory, and the second page of the exhibit, being No. 234 in the tariff, sets forth the various Philadelphia stations that took the Philadelphia basis of rates, regardless of where those stations were located, and whether or not there was any loading by the Pennsylvania Railroad Company of package carload freight.

Exhibit 69 continues the history of the tariff, becoming effective June 1, 1899, and it will be seen by reference to page 2 of the exhibit that various Philadelphia stations are included, all subject to the Philadelphia rate basis.

Exhibit No. 70 carries the history forward to the effective [fol. 506] date of May 15, 1902, and on pages 2 and 3 of the exhibit, the same situation is set forth.

I have not reproduced the tariffs after that date, because I know of my own knowledge that there was no increase made in the Philadelphia rate in order to cover the loading or unloading of this traffic.

Exhibit 71 deals with the rate situation to and from Philadelphia, and I file it with the same object in view, but in order to show that the Philadelphia rate bore a certain relationship to the rates from contiguous rate groups. I do not think we need to take the entire exhibit, but taking page 1 as an illustration, in the middle of the page there are set forth the first four class rates from New York to Chicago, they being on the well-known old scale of 75, 65, 45 and 35 cents.

At the bottom of the page and continuing to page 2, it will be seen that Philadelphia eastbound took the customary differential of two cents under New York, and westbound the differential of two 6's and four 2's. I should like to explain I am not dealing with the differential question at all as such, but am simply trying to show that the rates to and from Philadelphia—and by that I mean not only the Philadelphia stations, but all stations in the large Philadelphia rate group which I will later show—were subject to a differential under the New York rate.

Turning to page 3 of the exhibit, and going directly to the bottom of the page, it will be seen, for example, in connection with the last line of rates as set forth, that the rates from Philadelphia to Erie, Pa., Erie being the middle column at the bottom of the page, again bore the customary differential of two 6's and two 2's under New York.

It will be noted that only four classes are set forth there. [fol. 507] Then turning to page 4 of the exhibit, at the top of the page it will be seen, dealing with Erie and Pittsburgh, that the Philadelphia rate was again fixed at two 6's and four 2's under New York.

I should like to explain in filing this exhibit that I did not compile it as it is written up here. I extracted it from

certain of our records, in order to set forth this history, confining the exhibit to that portion which dealt with the relationship as between Philadelphia and New York. I did that to save time, instead of rehearsing it in oral testimony.

Exhibit No. 72 sets forth the picture, effective September 15, 1896 and continuing to the date effective May 15, 1902, which, of course, would carry it several years thereafter.

It will again be seen by reference to this exhibit, which sets forth the rates from New York, Philadelphia and Baltimore to Chicago, that Philadelphia was again on its customary basis of two 6's and four 2's under New York.

Turning to exhibit 73, this exhibit sets forth a somewhat different picture. I have taken numerous stations of origin on the Pennsylvania Railroad in Trunk Line territory, and have set forth on the exhibit the existing class rates which apply to all Philadelphia stations, regardless of their location. In every case the class rate is the same to all these Philadelphia stations from the particular point of origin set forth.

[fol. 508] Some of the stations at which there is no unloading or loading by the railroad are Germantown, Overbrook—there are a number of them. Just a minute and I can give it to you more definitely.

Q. I just want to have you point out further that there are a substantial number, and some idea of where they could be found.

A. Frankford, Holmesburg—well I have covered pretty much the different outlying parts of the city—they are Philadelphia stations.

Exhibit No. 74 is one which shows the westbound class rates from New York and from a large group of stations not within the city of Philadelphia, but which are subject to the Philadelphia group rate basis to Chicago, Pittsburgh and Buffalo.

It will be seen that the stations which run from Lancaster on the west, Reading and Pottstown on the north, and Wilmington on the south, are all subject to the one rate of $1.36, down to 45½ cents to Chicago, with a similar situation with regard to Pittsburgh.

[fol. 509] Exam. Brown: What is the object of these rate exhibits?

Mr. Bikle: To show these rates have never included anything on account of the service of loading or unloading, as indicated in the more formal statement that I made when Mr. Hickey asked for the service.

Mr. Hickey: You will notice, if the Examiner please, that the reasonableness of these rates to and from Philadelphia under Section 1 of the interstate commerce act, covers those definitely put in issue.

Mr. Bikle: I do not think that that follows:

Mr. Hickey: I have no objection.

Exam. Brown: Your complaints cover sections 2 and 3 only, is that correct?

Mr. Hickey: Yes, but the allegations under section 2, dealing with devices, is something very broad, and as you know, under recent decisions of the Commission, a rate may be unreasonable if it is unduly low as well as if it is unduly high.

Exam. Brown: Are you going to rely on section 1 at all, Mr. Hickey?

Mr. Hickey: You will notice in the complaint I have not made a direct allegation of violation of section 1. I held that out deliberately with the thought that we might avoid a great deal of litigation on that point. However, I do not understand that because I have withheld that from the [fol. 510] complaint, that in arguing the question of reparation I am prevented from arguing these rates from the standpoint of whether they are shown to be unreasonable under section 1 of the Act.

Exam. Brown: I am not ruling, of course, as to whether or not you may bring in evidence or argument with respect to section 1, but merely trying to get your position as to whether or not you intend to rely on section 1, so that the Commission may have a clear cut idea of what the issues are in the case.

Mr. Hickey: Well, you see the position I am in now.

Exam. Brown: At the present time it is my understanding that you do not intend to rely on section one?

Mr. Hickey: The reasonableness of these rates under section 1 is now very definitely before you in a number of exhibits and considerable testimony of this witness.

Exam. Brown: Now do you intend to rely on section 1 of the Act?

Mr. Hickey: Yes sir, I do.

Mr. Bikle: I must object, Mr. Examiner, because there is no pleading under section 1.

Exam. Brown: It is not in the complaint. I will make no ruling with respect to that at this time. We will put that in the record and the remarks of counsel will be considered at the appropriate time.

Proceed.

[fol. 511] The Witness: Coatesville, Lancaster and Middletown, as examples, are intermediate to Philadelphia as regards Chicago, but the rates are the same. There is no loading and unloading service whatever performed by the railroad at Lancaster, Middletown or Coatesvile.

Exhibit 75 sets forth the same situation as exhibit 74, except that exhibit 75 shows the eastbound class rates, and it will be noted by reference to the large group in the center of the exhibit, that one class rate applies to this very large group of stations, many of them outside the city of Philadelphia, at which no loading or unloading is performed.

In order that the Philadelphia group which I have reference to may readily be seen, I have filed this exhibit 76, which is a map, showing the eastbound rate groups as applicable to traffic from Central Freight Asociation territory.

The diagram there speaks for itself, without explanation. I simply want to point to the Philadelphia group in the right center of the exhibit.

With respect to rates to and from that group, there is no difference whatever made on account of the loading and un-
[fol. 512] loading service. The rate is identical to all of those stations.

Exhibit 77 sets forth the situation with respect to commodity rates, the interstate class rates as shown on the previous exhibits.

Q. The same facts are portrayed there?

A. They are, sir, except that in connection with exhibit 77 I have acompanied it by a map, exhibit 78. That map deals specifically with rates on manufactured iron and steel from Pittsburgh, and again shows the large group of Philadelphia rate territory to which the Philadelphia rates are applicable from Pittsburgh.

Exhibit 79 is an exhibit which deals with various commodities from various stations on the Pennsylvania Rail-

road in Trunk Line Territory, and the significance of this exhibit is contained in the word "all" in the caption of the exhibit. That is, these commodity rates apply to all Philadelphia stations, regardless of whether or not there is unloading or loading at those stations.

The first page of exhibit 80 is a form of the uniform straight bill of lading. The fourth page of the exhibit is a form of the local freight waybill of the Pennsylvania Railroad.

Now in the form of the bill of lading, it describes the property as "received from" and then there is a blank. At that point the name of the person from whom the traffic is received is put in. That name is inserted in the fourth block on the right hand side of the waybill, that, just to identify it a little further, reads: "Full name of shipper (origin and date, original car, transfer of freight bill and previous waybill reference and routing when rebilled)."

Now turn to the line on the bill of lading that says "Con- [fol. 513] signed to." After that word a name will be inserted. That name would be inserted in the block of the waybill (page 4) which is the fifth block down on the left hand side of the exhibit, which reads: "Consignee, address (final destination and additional routing)."

Mr. Hickey: Now if the Examiner please, we are—by this sort of testimony, we are going to arrive just where we arrived at in the McCormick case—had to try it over again—a whole lot of testimony about consignors and consignees, and not one of them named. Just testimony piled up on a blank document, which, after it goes in this way, will blossom out in an argument in the brief of my opponent, which may indicate to somebody that he has proved there is some consignee of inbound shipments back and beyond these warehouse companies. Now that is the purpose of it, and I say to you that if there is any consignee back of these warehouse companies in Philadelphia, that they ought to come forward and name that consignee. Let us have some real names of real persons, instead of this proof of consignee, without naming one consignee of one shipment, and without any documentary evidence of even one actual shipment before us.

Mr. Bikle: Mr. Examiner, you will remember that Mr. Hickey and I made a stipulation, after examining a whole series of documents that he called for, seting forth the form of the consignment and showing what names appear in this block, and exactly how they appeared, and this is merely to give the substratum on which to understand that evidence, that is all. I have been very careful in my questions not to ask Mr. Funck who was the consignor or the consignee or anything of that kind. I am only trying, as you asked, to [fol. 514] let the facts speak for themselves in the light——

Mr. Hickey: I thought we did a pretty good job at that time by bringing in the actual documents, and you read into the record what appeared on them.

Mr. Bikle: This is only to give it a substratum for correct understanding.

Mr. Hickey: Then with that understanding I will withdraw my objection.

Mr. Bikle: I want to offer these exhibits 58 to 80 inclusive, Mr. Examiner.

Examiner Brown: Any objection to these exhibits, other than have been already stated by Mr. Hickey?

Mr. Hickey: Yes, I have several.

Examiner Brown: Please state them.

Mr. Hickey: Exhibit No. 59, I object to the following statement that appears on that exhibit as being an unfounded and unsupported conclusion, in direct conflict with the very substance of that exhibit. The statement that I object to reads as follows:

"Extracts from P. R. R. station list showing Merchants Warehouse Company warehouses and Quaker City Cold Storage Company Spruce Street stores as P. R. R. stations."

Now I submit if you read what follows, it does not show those warehouses to be P. R. R. stations at all, and that is an unfounded conclusion, and I move that it be stricken out. What follows is some impotent writings of something to the effect that it includes all facilities of Merchants Warehouse Company.

[fol. 515] Now I submit that that does not make those Pennsylvania Railroad stations, and that you cannot make

structures operated by a private concern, railroad stations, by merely putting such writings as that in the tariff. If they are Pennsylvania Railroad stations, then they must be rented and used as such, and the Pennsylvania Railroad must have the exclusive use of them to use them as such. I move that that exhibit be excluded.

Examiner Brown: As I understand it, with respect to exhibit 59, you are objecting to the heading of it?

Mr. Hickey: Yes sir.

Examiner Brown? Not as to the balance of it?

Mr. Hickey: No, I don't object to the balance of it—that is, I will take Mr. Funck's statement that those are actual reproductions of writings in the published tariffs listed on that exhibit.

I object to exhibit 60 on the ground that it is incomplete to such an extent that it should not be received in evidence.

Examiner Brown: Incomplete in what respect?

Mr. Hickey: It reads as follows:

"In the application of storage rules, the charges as published in Agent B. T. Jones' tariff I. C. C. No. 1491."

Now this exhibit has no standing whatever, unless the Jones' tariff is put in to support it. I don't know whether the Jones' tariff applies at Buffalo or Chicago, or where it applies, or how it applies, but there is no substance whatever in exhibit No. 60, unless and until the Jones' tariff is brought forward and offered in evidence to support it, or such parts of the Jones' tariff as my opponent relies on. I [fol. 516] have not had an opportunity to go through all of these exhibits, and I would like to reserve the right to move to strike out, after I have an opportunity to read them. It will take me two hours to read these exhibits. I will make such objections as occur to me now.

Mr. Bikle: I have no objection to Mr. Hickey making a motion to strike if he wants to after he has read them over.

Mr. Hickey: I object to exhibits 74 to 76, inclusive, on the grounds that they are offered to show that the rates, either including or excluding the allowances, are just and reasonable under section 1 of the interstate commerce act.

Now the evidence shows that the Pennsylvania Railroad Company has voluntarily paid allowances out of these rates for many years, and it seems to me that that is an

admission that the rates are too high, which cannot be set aside by these exhibits that I refer to.

Those are all the objections I will present at the present time.

Mr. Bikle: Mr. Examiner, taking these up in the order that Mr. Hickey dealt with them, exhibit 59, he objects to the phrase as P. R. R. stations. Now, it is, of course, true that those words are not part of the excerpts that are incorporated in this exhibit. We think that the excerpts, together with all the other evidence in the case, justifies that description. Mr. Hickey does not. It is as though either Mr. Funck had testified that that was his opinion or I had said as counsel I thought that was the result. It does not go to the weight—I mean it does not go to the admissibility of the exhibit. It merely goes to the weight to be attached to that phraseology. The Commission will pass on the real issue.

[fol. 517] Exhibit 60, Mr. Hickey says we ought not to introduce that without introducing Jones' tariff. There again that objecetion goes, not to the admissibility, but to the weight. It has never been the practice before the Commission to bring in the whole tariff or every tariff that is referred to by cross-reference.

Now as to exhibit 71 and following exhibits, Mr. Hickey objects to——

Examiner Brown: 71 and 76, inclusive.

Mr. Bikle: Yes sir; those do not bring in issue the reasonableness of the rates. They show the relationship of this service to the rates, and I understand that you have already admitted those for what they are worth. If you have any doubt as to the propriety of that ruling, I should like to make a more formal statement that I have already partially made, because I shall wish that it appear in the record if they are to be excluded.

Mr. Hickey: I just want to be heard further on exhibit No. 60. I am not in a position to cross examine this witness in the absence of the Jones tariff. I do not know what the substance of exhibit 60 is in the absence of the Jones tariff.

Examiner Brown: In so far as exhibit 59 is concerned, that exhibit will be received, subject to Mr. Hickey's objection, with respect to the heading of the exhibit. It is

understood that he has not objected to the remainder of the exhibit.

Exhibit 60 will be received, subject to tariff check against the Jones tariff referred to.

In so far as exhibits 71 to 76, inclusive, are concerned, the Examiner is not entirely convinced that the evidence con-
[fol. 518] tained in those exhibits is entirely pertinent to this case, but as heretofore stated, he will receive those for what they are worth.

My ruling, therefore, is that exhibits 58 to 80, inclusive, are received in evidence, and will be considered in connection with the objections raised by the various parties as to them.

Cross-examination.

By Mr. Hickey:

I have never been employed at any time in the service of the Merchants Warehouse Company nor in that of the Quaker City Cold Storage Company. I have not examined the ledgers, cash books and day books of the Merchants Warehouse Company. I have made no inquiry into its contracts, agreements or relations with its customers.

The Pennsylvania Railroad Company gives allowances to warehouse companies at the present time at Philadelphia, Baltimore, Communipaw, N. J., which is a part of the Jersey City, and Washington, D. C.

Mr. Bikle: Mr. Funck, I don't want to interrupt, but if Mr. Hickey will permit me, is there any similar arrangement at Pittsburgh, at the Duquesne Warehouse.

The Witness: Not any longer.

By Mr. Hickey:

The giving of the allowance referred to appears in Pennsylvania Railroad tariff G. O. I. C. C. 14400.

It follows that warehouse freight, that is, general merchandise freight is delivered in a great many cities in this country when transported by the Pennsylvania Railroad Company, without giving any allowance, for example, at Harrisburg.

I described the service performed by the Merchants Warehouse Company which I said was for and in behalf

of the Pennsylvania Railroad, and I used two types. I did not refer to the type of service when I referred to [fol. 519] those two classes of warehouses. What I referred to was that in the case of Kensington and Shackamaxon, the warehouse track runs alongside of the warehouse, whereas at River Front Stores it runs right into it. It was a type—it was a question of the physical method of getting to or into the warehouse. The service is the same substantially.

The distinction as I say that I made was with relation to the track of the Pennsylvania Railroad Company. In each instance the service is the same. The warehouse company unloads the traffic either by truck or man power from the car into its warehouse.

Q. And that is the only service involving the physical handling of freight that the warehouse company performs for and in behalf of the Pennsylvania Railroad Company?

A. I assume when you say physical, you mean the actual man handling of the freight, if it performed that service—if you mean the first, the answer is yes.

Q. Now assume the placement of a typical car at some one of these warehouses of the Merchants Warehouse Company, an inbound loaded car, and tell me where this service performed for and in behalf of the Pennsylvania Railroad Company starts, and where it ends.

A. The service starts from—when the warehouse employes enter the car and take the freight out of the car, handling it or trucking it into their warehouse.

Now, of course, I don't know what subsequent handling they may give it in the warehouse. Then the freight after entering the warehouse is subject to 48 hours free time, after it has gotten into the warehouse.

Now if the consignee takes delivery within the 48 hours [fol. 520] free time, I do not know if the warehouse makes the charge for handling out. It if my understanding they do not, so that the service would end upon delivery to the consignee.

By Mr. Hickey:

Q. Now Mr. Funck, I will ask you again to state just where the service performed by the Merchants Warehouse Company on the inbound car starts, just where it stops,

and draw the line of demarcation, if you can, between the trade service of the Merchants Warehouse Company, and the public service of the railroad company.

The Witness: I would consider that the service of the railroad company stops first, under one circumstance, upon delivery to the consignee; secondly, in the case of merchandise which may be stored beyond the free storage period, I would consider that it stops at the end of the 48 hour period at its point of placement within the warehouse—that is to say, at the point where the warehouse employes place it in the warehouse when they unload it from the car.

Examiner Brown: I will let that answer in as an opinion of the witness for what it is worth.

The Witness: In the course of my inquiry I was informed that the Merchants Warehouse Company distributed inbound carload shipments to various parties to some small extent. I could not name any of the parties for whom the Merchants Warehouse perform this distribution service. I did not ask with respect to any consignee by name.

I would be very glad to describe in detail just what I did to find out what handling of freight is performed at warehouses of the Merchants Warehouse Company and I would like to say again, Mr. Hickey, that with only two exceptions, I did not enter their warehouses. I viewed the matter from [fol. 521] the viewpoint of the physical handling up to the warehouse. In order to find that out, I went through one of the warehouses of the Merchants Warehouse Company and the Quaker City Cold Storage Company in Philadelphia, in order to see the location of the warehouse, the location of the warehouse track, and the method of handling the merchandise from the car into the warehouse.

Q. Tell me where any of this service performed by the Merchants Warehouse Company differs from the service on inbound freight performed by the Bailey Warehouse?

A. I do not know, sir.

Q. Tell me where any of it differs from the service performed by the Terminal Warehouse Company?

A. I don't know, sir. I haven't seen their warehouse closely.

Q. Well, did not you consider it worth while to go there and inquire into that service?

A. Why, I did not think they would let me in. I saw their warehouse, but I certainly did not make any attempt to get into them.

Q. Did you ask them?

A. No, sir, I did not.

Q. And after your exhaustive investigation you cannot point out now where any of the service performed by Bailey differs from the service performed by the Merchants Warehouse Company, can you?

A. I made no exhaustive investigation of Bailey's warehouse.

Q. Nor of the Terminal Warehouse Company?

A. No sir.

Q. Nor of any of the other complainants in this case?

[fol. 522] A. That is correct.

Q. Do you know whether inbound carloads of freight are set on tracks of other warehouse companies in substantially the same manner that inbound carload shipments are set at warehouse of the Merchants Warehouse Company?

A. Last week I saw one warehouse, and I think it is the Bailey Warehouse. It is my recollection that a car is placed alongside the platform. That is as far as I can answer your question.

Q. Did you not see just as much there as you did at any of the warehouses of the Merchants Warehouse Company on your visits?

A. No sir.

In addition to viewing these premises or warehouses, as far as I have explained to you, I discussed the matter with our division freight agent's office in Philadelphia, and in several cases with the freight agent in Philadelphia, in order to ascertain what they did in conjunction with such shipments. The man I discussed it most with was Mr. [fol. 523] Rowland in our office in the Bourse. I also discussed the matter with Mr. Robb. He is chief clerk, I think, at our Federal street station. I discussed the matter with Mr. Robert Hammersly, one of our freight agents; with Mr. William Hammersly, one of our freight agents, and with an assistant chief clerk at Walnut street wharf, whose name I do not know. I asked them two particular things that I wanted to know, who collected the freight charges. I also asked them in detail how the warehouse

company ascertained that a car of freight was there—that is, I am speaking now as to the physical handling of the car. I think that is all.

I don't think that that describes all of the service performed by the Merchants Warehouse Company, on which it has claimed allowances and obtained payment for. I think they told me that a shipment might be placed at a certain point in the warehouse, and then for some reason they might have to move it. In other words, if the shipment was trucked in at a door, placed in a certain location and stayed there until tomorrow, it might be necessary for physical reasons to clear that space and move it back.

I heard that the Merchants Warehouse Company was claiming and getting allowances on carload freight delivered from public delivery tracks in Philadelphia. When I heard about that, I inquired into it.

When I went around to these stations, I heard at two stations that traffic had been delivered, not through the warehouse, but from the team track. I was informed that certain traffic had been delivered from the team track at two freight stations. As a matter of fact, long before I made the inquiry, it appears that a gentleman representing the Interstate Commerce Commission, Mr. Sturm—that is as [fol. 524] closely as I can give you his name,—had made a previous inspection. As a matter of fact it just happened that I followed him up, and he had brought up this question—such traffic as I say had been delivered. I took the question up with Mr. Craft, one of our auditors, personally, in order to call his attention to it, but I found that as a result of Mr. Sturm's activities he knew about it, and he had already started the machinery going to collect back money from the Merchants Warehouse Company on the traffic delivered over the team track.

Examiner Brown: Allowances paid to the Merchants for that traffic?

The Witness: They were paid erroneously for that traffic.

Mr. Campbell: Public team track?

The Witness: Practically a public team track—our station track at whatever the point may have been.

Examiner Brown: The reason you have taken steps to require the repayment by the Merchants to the Pennsylvania of this allowance is that it is not covered by tariff authority, is that correct?

The Witness: Yes sir; traffic did not go through the warehouse.

Mr. Glasgow: Nor by the contract.

Examiner Brown: It is a question of whether or not the tariff authorized it, rather than the contract, as I see it.

Examiner Brown: This particular point may have some bearing in the case. That is why I am letting it in. It is not exactly within the issues as stated in the complaint, but it may have a collateral bearing. For that reason I will not exclude it.

Mr. Bikle: I have not asked you to exclude it, Mr. Examiner.

The Witness: One of those two stations I referred to [fol. 525] where this has been going on was at Broad and Washington Avenue; the other one I am not certain at the moment, whether it was Kensington or Shackamaxon, but both stations are not very far apart, and it was one or the other.

I can not tell the proportions of inbound freight carried at carload rates, carried at any-quantity rates and carried at l. c. l. rates,—I have nothing whatever to separate the carloads or less than carloads.

I did not make any inquiry into the inbound traffic to the River Front Stores. I was under the impression it was all carloads—that is true of 31st and Chestnut Street.

It was my impression that all of this freight—inbound freight upon which the claims were made was carload freight transported at carload rates. I really did not make any inquiry, because I had that idea. May I have just a second?

Q. Yes.

A. My answer still stands, but I do not see anything in the tariff referring to carloads only.

Examiner Brown: Don't see anything in the tariffs referring to carloads only.

The Witness: I made no inquiry whatever with respect to less than carload traffic. I see that they do handle less than carloads under this tariff.

Examiner Brown: At what station?

The Witness: At Dock street, but rather specifically to River Front Stores and Wood Warehouse, as additional points of receipt and delivery of carload and less than car-

load freight. At the other points the tariff does not state whether it is carload or less.

[fol. 526] In my inquiry into this matter I did not find out what services the Merchants Warehouse Company performs in handling the traffic of the Morton Salt Company, the Bon Ami Company, the Worcester Salt Company, the Quaker Oats Company nor any of those concerns referred to in the testimony of Mr. Henry. I did not get down to the handling of any individual shipments.

In my investigation of this matter, I did not inquire into the similarity or dissimilarity of delivery of carload freight to any other concerns in Philadelphia, other than the Merchants Warehouse Company and the Quaker City Cold Storage Company.

Q. Do you want to continue paying these allowances to the Merchants Warehouse Company?

A. Well, the way you put it, of course, you understand, Mr. Hiekey, that the Pennsylvania Railroad Company always wants to save any money that it can. However, we have these contracts with the warehouse company which we do not consider unlawful. We think we are obligated by them, and we cannot break them.

Now the say you put your question, the question is whether we want to continue it, if I understand you. If we discontinue it, I may say the arrangement, as you yourself know, has been in effect for a very long time, and any move to discontinue it would be very unpopular. Just bear in mind in connection with that that the payment of the allowance carries with it the unloading of this carload traffic. I think you have a background to the whole thing that you cannot overlook. That background is the fact that I have already referred to in my direct testimony that we make delivery. We unload certain carload freight and make de-

[fol. 527] livery over our platforms. That has been in effect for a great many years. We have the competition with these steamship lines who unload on to their piers. In doing our unloading we cannot overlook this competition with the steamship lines, so that you see the competition there. Now if we do it at our own freight stations, then I don't see why we should do it at a contract warehouse if it is confined within reasonable bounds. Coming back to the first part of your question, don't overlook the fact that the

payment of this allowance is not simply a gift, it is for the unloading and the other service.

All of these complainants have to unload the freight that comes to their warehouses, and when it is shipped inbound over the Pennsylvania Railroad, they don't get these allowances.

I spoke of the competition of the steamship lines. I have in mind traffic to different portions of the country. Take canned goods as an illustration. We handle canned goods outbound. The steamship companies also handle that traffic outbound. Now there is definite competition between our company and the steamship company. I have in mind the Philadelphia & Norfolk Steamship Company very specifically in taking traffic away from us, and they have, as far as I recall it, through rates from Philadelphia to Central Freight Association territory, via water to Norfolk, thence rail lines beyond, and they are in direct competition with us.

I haven't in mind any other specific commodity. I have in mind any general merchandise that they can handle and that we can handle.

[fol. 528] Q. Now will you point out just how the giving of this allowance to the Merchants Warehouse Company helps you out in that competition with the steamship lines for traffic?

A. I don't think I said that specifically. My statement was this: You asked me about the allowance to the Merchants Warehouse Company, and I showed you that that is not a question of allowance alone. It is a question of unloading carload freight, also loading. I am just speaking of unloading. Now that unloading is not confined to these contract warehouses. It is also performed at our other Pennsylvania Railroad operated freight stations in the city of Philadelphia. There is where the steep competition comes in.

Q. Now can you specify any other commodities in this steamship traffic?

A. Well, I haven't in mind any specific situation that I have heard of. I would say for example such things as vegetable oils, lard and lard compounds, and the numerous kinds of package freight that a steamship company would handle and that we would handle.

In my study of this competition, I did not go into the cost of trucking to and from the steamship lines, as compared with the cost of trucking to and from these inland warehouses shown on my map.

As to the Pennsylvania Railroad, I would say there are 33 stations that have public delivery tracks and only two that have not public delivery tracks.

Redirect examination.

By Mr. Bikle:

Q. Mr. Funck, in explaining to Mr. Hickey your views as [fol. 529] to when the railroad's contract with the shipments handled at and through the warehouse terminals—warehouse companies, you referred to the storage of that traffic during what you call free time, or until delivery by the warehouse to the person who took it away within the free time. Has—is any payment made by the railroad company to the warehouse company on account of having the freight stored there during that period over and above this allowance that is shown in your exihbit 62, or does that allowance cover that matter as well as the other?

A. That allowance covers that matter.

By Mr. Glasgow:

Q. Who insures the freight while it is—during that 48 hours?

A. The warehouse company.

Q. Does the railroad company pay the insurance?

A. No sir.

Q. Mr. Funck, in any report made to your company by the warehouse company as to the condition in which the freight is received, when it is taken out of the car?

A. I have not gone into that in detail, sir. I could only give you my general understanding of it.

Q. Haven't you seen statements to the railroad company where there was a report as to the condition?

A. No, I would not say that.

By Mr. Hickey:

Q. Well, Mr. Funck, don't you know from your experience as a traffic official of the railroad, that at all points on

the Pennsylvania Railroad where it delivers freight, if a shipment is damaged it gets a claim and a statement of the [fol. 530] condition from the claimant?

A. That is correct.

Philadelphia, Pa.,
October 9, 1928.—9:30 o'clock a. m.

Met pursuant to adjournment before Examiner R. M. Brown.

Appearances: Same as before.

Proceedings

EDMUND FUNCK resumed.

Recross-examination.

By Mr. Hickey:

I have produced the copies of freight bills from one of the three stations that I referred to yesterday. It is the same form as the second underlying copy, entitled "Local Freight Bill", exhibit No. 80, fifth page.

I would certainly think that the arrival notice was stricken off at the same time the freight bill and the balance of the forms in this exhibit 80 were struck off, at a freight office of the Pennsylvania Railroad Company. Of course, some of the traffic, you understand, might originate at a point beyond our line, but that would be the case with respect to the traffic originating at a Pennsylvania Railroad point. I think this arrival notice was issued in the regular freight station of the Pennsylvania Railroad.

I have made a brief examination of the first book of those freight bills and I find one here billed prepaid. Yesterday [fol. 531] I gave some percentage figures. In computing those percentage figures I did not take into account the inbound shipments delivered at the Merchants Warehouse Company that were billed prepaid.

Q. Now may I see one of those freight bills on some shipment consigned to the Merchants Warehouse Company? Pick out the first one you find.

A. (Handing counsel a freight bill.)

Q. Mr. Funck, you have shown me a freight bill No. 40382, under date of June 23, 1928, purporting to cover a shipment of baled hay, and under the caption "consignee, address, final destination and additional routing," I find the following typewritten entry: "M. Callan, care of Merchants Whse." I will ask you, Mr. Funck, if by looking at that document you can determine from whom the Merchants Warehouse Company obtained the freight charges on that shipment?

A. No, I cannot tell by looking at that document—that is, assuming you want a definite answer.

I could not say at the moment whether they have a record in the local freight office or in the Treasurer's office which would indicate the exact person from whom they obtained the freight charges. They may or may not have. I don't know who keeps that exact record. I would assume it is at the local freight office.

What I did in my investigation was I asked at the various freight stations, without respect to any particular shipment, how they collected their freight money; how they actually got possession of the money. In general, with respect to the traffic consigned to persons who are on our so-called [fol. 532] credit acommodation list, that money is collected by the Pennsylvania Railroad through the customary channel—that is, the treasurer's office, directly from such consignee. With respect to the traffic consigned to persons who are not on that credit list, the traffic is placed by us on the warehouse track in the customary manner; the warehouse unloads it and the warehouse company is given or issues a document similar to this, indicating that it is collect, and they are told that the consignee is not on the credit accommodation list, so that we warn them that we look to them for the collection of freight charges, so that they may not deliver it without the collection of such charges. Now your question now is the exact document they have for indicating who paid the freight charges. I didn't investigate any such document.

Now the second part of the question is with regard to the treasurer's office. What I did there was I told the treasurer to give me a statement or a summary of the charges col-

lected respectively by the Pennsylvania Railroad and by the Merchants or through the Marchants Warehouse Company, and that is the summary which I have and which I referred to in speaking of my investigation through the treasurer. Referring to those freight bills again, the Pennsylvania Railroad Company when it sets out to collect freight charges on one of those shipments, apparently can collect those freight charges only from somebody named on that freight bill.

[fol. 533] Q. However, the Merchants Warehouse Company, if it sets out to collect freight charges from some customers that it has private dealings with, it does not necessarily have to collect those freight charges from somebody who is named on that freight bill, does it?

A. I don't know how they get it. I did not go into that point in my investigation.

Q. I want to question you about the Jones' tariff referred to in your Exhibit No. 60, which is I. C. C. 1491.

A. I have that tariff. It has ben superseded by another tariff effective April 1, 1927.

Mr. Hickey: Mr. Funck, I will read from the top of page 10 of that tariff, and will you follow me and see if I read it correctly:

"Storage rules and charges applicable to freight held or stored in or on railroad premises of railroad parties to this tariff."

Did I read it correctly?

A. That is correct, sir.

Q. You have examined this tariff, I take it, Mr. Funck?

A. In general. You realize I did not have an opportunity to go into it in detail.

Q. Is it true that there are two classes of rules in that tariff, revenue rules and free time rules?

A. That is correct.

[fol. 534] Q. Now in your exhibit No. 60 you refer to a tariff provision which apparently makes the free time provisions of that tariff applicable at warehouses of the Merchants Warehouse Company, isn't that true?

A. That is true.

Q. And only the free time provision?

A. That is true, by the caption.

Q. Now Mr. Funck, the free time is an absolute vacuum when you separate it from the revenue rules of the tariff, is it not?

Mr. Bikle: Mr. Examiner, I think that is getting into the argumentative state. That is where Mr. Hickey and I entertain different views.

Mr. Hickey: All right. I am perfectly willing to let is go that way. I won't press the question.

Exam. Brown: The statement in exhibit 60, the following appears:

"The following warehouses in Philadelphia, Pa., are considered freight stations during the free time."

Will you tell me who considers these as freight stations? Does the Pennsylvania Railroad?

The Witness: Yes sir.

F. D. No. 199 of the Pennsylvania Railroad Company is a list of private sidings, steamship line piers and carload and less carload deliveries. This is not a filed tariff. I [fol. 535] stated yesterday that there were two Pennsylvania Railroad stations in Philadelphia that did not have public team tracks, and that there was 33 that did. In F. D. No. 199 there seem to be listed a great many more than those 33 stations. When I spoke yesterday of 33 stations, I meant 33 agency stations.

Now you will notice by reference to this list that we have included therein deliveries,—that is, we have taken a station and have listed thereunder its various deliveries. In order to clear that up, if you will permit me, I will take one single illustration, North Philadelphia, and refer to it on map exhibit No. 58. Now North Philadelphia is one station, but taking this map as an illustration, you will find that we have a 12th street yard; that yard is immediately northeast of the K in the circle on map exhibit 58; that 12th street yard is under the jurisdiction of North Philadelphia.

Similarly we have what we call a Diamond street yard. That yard is quite a little distance from North Philadelphia where our tracks on the New York division cross Diamond street, but it is also under the jurisdiction of North Philadelphia. Now I venture to say that we might take numerous other illustrations where the same thing is true, but I think that one illustration will very clearly show you what the

situation is. Just to go a step further, I find here a number of our Chestnut Hill branch stations listed. Midvale is an illustration of that. Midvale similarly is under the juris-
[fol. 536] diction of North Philadelphia, and it is shown on the map, exhibit No. 58, about two inches to the left of the letter K. Now those illustrations could be multiplied a number of times.

The two stations which I stated did not have public team track delivery were Dock Street and Walnut Street wharf. Walnut Street wharf is not a station used for the interchange of traffic with steamship lines. Washington Avenue wharf is.

Q. Again referring to page 26 of that document which I identified as F. D. 199, that shows quite a number of qualifications concerning the handling of freight at various stations—that is, that some of those stations will receive inbound freight only from certain deliveries, some of them will handle outbound l. c. l. freight under certain conditions, and there are a number of qualifications on that page, are there not?

A. May I just revise it to this extent—there are a number of qualifications with regard to carloads and less and with regard to livestock, and so forth, and the territorial restrictions are confined more generally to Dock street, Walnut street Wharf and Vine street, and the reason for that is the reason I gave yesterday, using Walnut street wharf we float traffic from our Camden terminal to Walnut street wharf, so as a physical matter we are confined to traffic from West Jersey & Sea Shore Railroads, our New Jersey territory and New England, and the same general situation with regard to Dock street and Vine street.

[fol. 537] The document above referred to, F. D. 199, is put in the hands of the employees of the Pennsylvania Railroad to guide them in certain respects—with regard to shipments for certain consignees in Philadelphia; and the particular location where shipments will be delivered. It is a document issued by the traffic department and the accounting department of the Pennsylvania Railroad, but it is chiefly a traffic department issue. It is not filed with the Interstate Commerce Commission. Copies of it are sent to our connections at junction points to assist them in the forwarding of traffic to Philadelphia for the certain con-

signees designated therein. It is just a list of certain facilities that the Pennsylvania Railroad have, and the uses which they should be put to. It is to facilitate the delivery of freight in Philadelphia.

In my inspection of the warehouses of the Merchants Warehouse Company, I did not notice that the Vacuum Oil Company occupies certain space in the Federal Street Stores. As to whether I noticed that Sherwin-Williams Company occupied certain space in the River Front Stores, I cannot just give you yes or no to that. I was not in the River Front Stores but I did notice that Sherwin-Williams had their sign on some portion of the outside of the River Front Stores. It is either painted thereon, or else it is a small sign that hangs over one of the entrances.

Q. Did you notice quite a number of lessees of the Merchants Warehouse Company occupying space in these vari-
[fol. 538] ous warehouses, when you went around them?

A. I cannot say whether they were lessees, but I can say this, that as to the River Front Stores particularly, I did notice a number of signs, either painted thereon, or signs hanging thereon, indicating various concerns, such as Sherwin-Williams, Richardson & Boynton, and various other concerns who evidently have their location in those Stores.

There might be 50 of those concerns, based on these signs there might be 100, it might run that high; I did not count them.

Q. Now when you found those concerns occupying those buildings, or certain space in those buildings, that did not prevent you from putting in this exhibit No. 59, indicating that the same facilities were included in certain freight stations of the Pennsylvania Railroad?

A. No sir, my exhibit 59 simply portrays what our tariff shows.

[fol. 539] By Mr. Campbell:

Q. Mr. Funck, assuming a shipment delivered at one of the Merchants' Warehouses here, and the bill of lading reads John Smith, care of Merchants Warehouse Company, and assume that that is an order-notify bill of lading, when that shipment reaches one of the warehouses of the Merchants Warehouse Company, is it delivered to the warehouse company without surrender of the bill of lading?

A. I cannot give you a yes or no answer on that. What happens is this: The car is placed on the warehouse track, and our people at the respective freight stations tell the Merchants Warehouse Company, partly by means of a document similar to the one which I have filed as exhibit 80, that the consignment is an order consignment and that it must not be delivered wtihout surrender of the bill of lading. In other words, we look to the Merchants' Warehouse Company not to turn it over to the consignee until the bill of lading is surrendered.

Q. Ordinarily in the case of any shipment over your railroad on an order-notify bill of lading, the railroad company would not deliver that shipment without surrender of the bill of lading, would it?

A. That is correct.

[fol. 540] Exam Brown: At this time I think it would be relevant and helpful to get the exact position of the intervenor represented by Mr. Campbell.

Mr. Campbell: If your Honor please, the position of the intervenor is simply this: It is a Federation association, composed of about 300 members, millers located all over the country who ship large quantities of flour to Philadelphia, and under the arrangement which exists at Philadelphia, which is directly in issue here as I understand it, under the discriminatory part of section 2, of the Act, and also under the allegation that it violates section 1 of the Elkins Act, we claim that we have a right to be heard, because we claim we are injured by this practice, and we claim we have a right to be heard, because the issue is squarely raised as to the legality of this transaction here at Philadelphia. Now ordinarily I will grant you that under a section 3 case that where the Commission would issue an alternative order, then, of course, the discrimination could be removed by the railroad company in one of two ways: It could grant the same to the next contract warehouse, or it could cut the whole thing out. I think the section 2 issue clearly gives us a right to be heard here in this case. We are not seeking reparation at all.

In this case, under the theory of agency, for a 24-hour period the flour is delivered to the warehouse company, and then it—and then a different situation exists. That warehousing agency and very often the miller who has shipped

this flour finds himself in the position where his draft is still in the bank for three to six months, according to their testimony, and that of course is highly prejudicial to the miller.

[fol. 541] Examiner Brown: The Reading may proceed.

WILLIAM B. GHEEN was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Woodcock:

My name is William B. Gheen, address, Reading Terminal, Philadelphia, Pa. I am employed by the Reading Company in the capacity of assistant freight traffic manager. I was appointed assistant freight traffic manager May 28, 1928; was general freight agent for about a year prior to that time. About four years prior to that as coal freight agent, and about two years service as division freight agent, Philadelphia territory.

I am familiar with the issues involved in the complaint which is Sub No. 2 in this docket.

I have prepared a map (exhibit 81) showing the various freight stations of the Reading Company in the city of Philadelphia, also indicating the location of the warehouses with which the Reading Company has contracts.

The map, as will be noted, shows all of Philadelphia [fol. 542] County, and prominent thereon the line of the Reading Company and its various freight stations, and added to the map in symbols has been shown the locations of the Pennsylvania Warehousing & Safe Deposit Company and the Philadelphia Warehousing & Cold Storage Company. The Philadelphia Warehousing & Cold Storage Company is shown on the map as indicated by the blue cross in the blue circle at a point adjacent to our Willow and Noble Street station.

The warehouses of the Pennsylvania Warehousing & Safe Deposit Company are indicated by numbers in red circles, 1 to 5, inclusive, 1 the Port Richmond Stores near our Port Richmond stations; 2, the Poplar street store, just north of

our Willow and Noble street station, but under the jurisdiction of our Port Richmond Station; No. 3, the 16th street Stores—16th and Callow Hill Stores near our Broad and Callow Hill street station; 4 and 5, the Delaware avenue Stores, including that group known as Delaware Avenue Stores and the Moro Phillips Stores, which is one of the units of the Delaware Avenue Stores. The legend shows as I have explained.

The nature of this section of the city where the warehouses that I have mentioned are located is the highly developed industrial section of Philadelphia.

The general rule with respect to the loading and unloading of package freight, carried at carload rates, as appears in the Consolidated Freight Classification, provides that the owners shall load or unload the carload freight carried at carload rates.

There are exceptions to those rules and those as made by the Reading Company, published in supplement No. 48, to [fol. 543] I. C. C. No. 189, provide that at certain stations named the Reading Company will load or unload package freight, carried at carload ratings.

I have a statement (exhibit 82) containing an excerpt from the Official Classification, and also from the Reading Company's exceptions, dealing with this question.

This loading and unloading service referred to in item 625-B, as shown on the exhibit is not performed immediately at the railroad freight station in all cases.

In addition to providing for the loading and unloading of the package freight at the freight stations, we also have arrangements for performance of the same service at the warehouses which are shown on the map, exhibit No. 81. These arrangements are covered by contracts which are already a part of the record in this case.

By Mr. Woodcock:

Q. Mr. Gheen, will you please state to what warehouses the contracts which have been introduced in evidence as exhibits 53 to 57, inclusive, relate, referring to your exhibit 81?

A. The original contracts relate to the agreements between the Philadelphia & Reading Railway Company, the predecessor of the Reading Company, with the Pennsyl-

vania Warehousing & Safe Deposit Company and with the Philadelphia Warehousing & Cold Storage Company. The original contract with the Pennsylvania Warehousing & Safe Deposit Company relates to the 16th street Stores, but by subsequent agreements, the contracts—the terms of them were extended to the other stores of the Pennsylvania Warehousing & Safe Deposit Company, Delaware Avenue Stores and Moro Phillips Stores, and also another contract with the Port Richmond Stores.

Exhibits Nos. 53 and 54 include the contracts which relate [fol. 544] to the 16th Street Stores.

Exhibit No. 55 and exhibit No. 56 relate to the Delaware Avenue or the Port Richmond Stores.

Exhibit No. 57 relates to the contracts covering the warehouses indicated by the blue cross on my exhibit No. 81, being the warehouse of the Philadelphia Warehousing & Cold Storage Company.

The contracts bearing exhibit Nos. 53 and 54, relate to all of the warehouses indicated by the red letters on my map, with the exception of the warehouse indicated by the red letter 1.

I am familiar with the service which the warehouses render for the railroads under the contracts which I have just mentioned. The warehouses perform the same service as the carrier would perform at its freight station.

Mr. Hickey: I object to that. That is an unfounded conclusion.

The Witness: I know it.

Examiner Brown: The witness may finish his answer, and then I will hear Mr. Hickey and will rule it out if I deem it improper.

The Witness: That is the unloading of the freight from the car, inspection of the freight for possible damage, responsibility for the freight, insurance, the delivery of freight to the owner, and the collection of freight charges—exactly the same service that one of our agents performs at one of our own stations.

Mr. Hickey: I move to strike out the witness's answer on the ground that he is not qualified to testify what is done with this freight, after the car is placed on the private siding at the warehouse. These warehouses are private corporations. There is nothing shown in his qualifications

[fol. 545] that he ever was in the service of these warehouse companies or ever was in a position to gain any information about what these companies do with freight after they take possession of it.

Mr. Woodcock: Of course the witness testified that he was in a general capacity at Philadelphia for a number of years, and he also said that he knew what services they render. If Mr. Hickey wishes, I can go further into the basis of his knowledge.

Examiner Brown: In order to lay a basis of fact for his knowledge of the situation, I would suggest you do that.

By Mr. Woodcock:

Q. Mr. Gheen, what is the basis of your information with respect to the services rendered by the warehouses under their contracts with the railroad company?

The Witness: I should first state that in the years 1922 to 1923, if I recall correctly—it was about that time I was division freight agent for the Reading Company. My territory included all of the city of Philadelphia. It was my duty to familiarize myself with the freight handling and practices in the city of Philadelphia, acquaintanceship with the shippers and receivers, the warehouse company, and every one handling freight. My duties took me to the freight stations, to the warehouses, where I conferred with our own employes, not particularly with the warehouse business, but with all freight business. I visited the various warehouses, not only the ones that are named here, but every warehouse in Philadelphia, and I am familiar with their operations.

I cannot recall any single instance of any particular kind of freight being handled, but from walking from floor to floor of the various warehouses, interviewing their super- [fol. 546] intendent and talking with them, the heads of the warehouses, why, of course, I know what they do in those warehouses.

Mr. Hickey: I urge my objection.

Examiner Brown: The evidence will stand and will be considered in connection with the objection.

The Witness: I know that the warehouse companies are performing the services which they agreed to perform under the contracts here in question for the railroad.

The railroad company pays the Pennsylvania Warehousing & Safe Deposit Company for performing such service, the amounts as stated in the contracts, 30 cents a ton on the general merchandise, 15 cents a ton on newsprint paper, and that latter payment is a modification of the original contract.

The Philadelphia Warehousing & Cold Storage are paid 50 cents a ton on articles requiring cold storage or refrigeration.

Examiner Brown: What is your tariff authority for those payments?

The Witness: We do not publish any tariff to show those payments.

I spoke of a payment for newsprint paper being 15 cents. That amount represents a reduction from the original 30 cents generally applied to merchandise. The original amount was 30 cents, and that was reduced to 15.

I have a mimeographed copy of a letter (exhibit 83) dated January 31, 1908, written by B. H. Bail, general freight agent of the Reading Company, to M. E. Levering, treasurer and general superintendent of the Pennsylvania Warehousing & Safe Deposit Company, providing for this reduction in the payment to be made in connection with the [fol. 547] handling of shipments of newsprint paper. These contracts were made many years ago, and of course there is no one available who can state of their own knowledge as to the conditions that brought about these agreements, but from general information that can be obtained, the railroad companies at that time felt the need of additional facilities, where this carload package freight could be unloaded and taken care of, delivered, where additional facilities could be provided for storage and general service that might be required by the commercial interests of Philadelphia. It was also a factor advantageous to the carriers in having the equipment promptly released, as would not be the case on team track deliveries, and that in my belief brought about these contracts with the warehousing concerns.

The following stations have jurisdiction over the warehouses shown in my exhibit No. 81:

Port Richmond station has jurisdiction over the Port Richmond Stores, indicated 1 in red circle, as they also have jurisdiction over the Poplar street stores, circle 2.

Our Broad and Callow Hill street station has jurisdiction over the 16th street stores indicated by circle 3. Our Willow and Noble street has jurisdiction over the Delaware Avenue stores, Nos. 4 and 5 on the map. Noble Street also has jurisdiction over the Philadelphia Warehousing & Cold Storage Company's warehouse, indicated by the blue cross in the blue circle on the map.

All of these stations that I have mentioned as having jurisdiction over the warehouses are stations which are included under the Reading Company's exceptions in my exhibit 82, and stations at which under that exception the railroad performs loading and unloading service in con-
[fol. 548] nection with carload package freight.

By carload package freight, I mean carload package freight carried at carload rates.

There are supplemental facilities which are used in connection with the handling of freight consigned from and to these stations. At all of the larger stations there are supplemental facilities, which are not listed as separate and distinct stations, or even as parts of those stations. Probably I can best explain that by stating that at Willow and Noble Street station, one of the largest stations in Philadelphia, there are several places where carload freight can be and is unloaded. Under the jurisdiction of that station where piers are, the same service is performed in the handling of freight as would be performed at the Willow and Noble Street group of freight houses, but we consider them pier stations, and they are just as much a part of that general layout as an individual warehouse at Willow and Noble Streets may be, and that condition is true at a number of other points.

The Reading Company has 46 freight stations in Philadelphia County.

This exception in respect to the loading and unloading applies only at 12 of those stations.

All those stations at which exceptions do apply are located in the industrial section to which I referred in discussing my exhibit 81. The highly developed commercial section of Philadelphia surrounds these stations.

I would like to add, so that our position may be clear, that these contracts that we have made, have, since their inception, been entirely satisfactory to the carriers. The

warehouses have performed their service to us in a satis-
[fol. 549] factory manner, and we believe that this service is of public interest, advantageous to the commercial interests of Philadelphia, and that is sustained by the interest that those commercial interests have taken in this proceeding, and we desire to have this practice sustained.

Examiner Brown: These exhibits will be received as defendants' exhibits 81 to 83 inclusive, and will be marked in evidence.

Cross-examination.

By Mr. Hickey:

Those extra facilities that I referred to in my testimony are not listed in circular No. 225 of the Reading Company. In my testimony in referring to some documents I put into evidence, I said something to this effect, that the Reading Company had a good many delivery facilities that are not specified in these documents that were put in evidence. Those various facilities are not listed in that document No. 225 as separate and distinct facilities, although this document does show the location and the station authority over such locations of the various warehouses, not only those that we have mentioned in this proceeding, but other warehouses. It also shows the stations in the Philadelphia city delivery, and indicates the character and kind of freight handled in those facilities. It does not show, as I tried to illustrate, the piers as station facilities. My purpose in mentioning that was to show that we do have other facilities in Philadelphia, other than those that are listed as regular freight deliveries.

That circular No. 225 is an official publication of the
[fol. 550] traffic department or operating department of the Reading Company, but it is not filed with the Commission.

The purpose of this circular is to have in the hands of our agents at the outlying—or the stations out of Philadelphia, information that will enable them to properly forward freight that may be consigned specifically to deliveries or to consignees in Philadelphia. That is the general purpose of the circular, and I might add also, furnished to our connections.

These payments that I testified to, are made only on freight transported at carload rates and are not made on freight transported at l. c. l. rates.

Redirect examination.

By Mr. Woodcock:

The circular bearing No. 225, is not published as a tariff with any Commission.

With regard to the facilities at particular station-, in my opinion the use of the name of the particular station certainly does include any facilities that are used in connection with that station.

The payments to which I referred are only made for such traffic as is covered by the contracts.

We have made investigations from time to time of the payments to the warehouse companies, for the purpose of determining whether or not our agents were submitting the proper statements. Our investigation has been that in no instance has any payment been made to the warehouse company on any traffic in which the warehouse company would have ownership, or any ownership interest in it.

[fol. 551] By Mr. Glasgow:

Q. Does you answer show or is it intended to show that wherever your investigation showed that the warehouse company had any beneficial ownership in the traffic, that no payments were made to it?

A. That is correct.

Examiner Brown: The Baltimore & Ohio may proceed with its case.

H. G. Settle was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Webber:

I am assistant to the freight traffic manager of the Baltimore & Ohio Railroad Company, at Baltimore, Md. My

testimony in these proceedings relates solely to docket No. 20968, Sub No. 1, which is the complaint of Bailey, et al., against the Baltimore & Ohio Railroad Company.

I have made a study of this case as it affects the Baltimore & Ohio and am familiar with the issues.

I offer, as exhibit 84, a map of Philadelphia, showing the location of stations of the Baltimore & Ohio and their deliveries within Philadelphia.

That map shows our station deliveries in the city of Philadelphia, operated by our local forces along the Delaware River, as well as our 24th and Race Street freight station and team tracks; also our inland station at Lehigh Avenue and Howard Street.

It also shows the location of the warehouse of the Pennsylvania Warehousing & Safe Deposit Company, known as [fol. 552] the Delaware Avenue Stores, and the Moro Phillips Stores; also the warehouse of the same company at 23rd Street, known as the 23rd Street stores. The warehouse at the last location is immediately across the street from our local station platform, while the warehouse on Delaware Avenue, known as the Delaware Avenue Stores and the Moro Phillips Stores are across the street, Delaware Avenue, from Pier 24.

The general practice with respect to the loading and unloading of carload freight throughout Official Classification territory is for the consignor to load and the consignee to unload carload freight. There are, however, exceptions to that general rule at points particularly along the Atlantic seaboard, such as New York City, Philadelphia, Baltimore and Washington, where the carriers or their agents perform that service. It is very impractical at some points to permit the consignees or owners of the freight to do that service themselves. For instance, we have stations at New York which are not reached by rail. It is necessary to float carload shipments to those stations and place those floats alongside the pier or dock, and to release those floats it is necessary for the local force to unload them and place the contents of the car at a convenient location on the pier, where the owners of the freight can take delivery and truck it away. It would be impractical—altogether impractical to permit owners or consignees to come on the pier and perform that service themselves. The situation along our

Delaware River piers at Philadelphia—some of them at least—is comparable to the situation at New York.

Another reason why we perform this service in these several cities is to meet water competition; particularly [fol. 553] with respect to Philadelphia there is a very considerable amount of water competition which we are required to meet. I might call attention to the competition as between Philadelphia and Baltimore. We run into that competition daily. There is considerable tonnage being handled by the boat lines. Those boat lines naturally load and unload the boat from their piers without requiring the consignor or consignee to perform any service in connection therewith and, therefore, we have felt that we were required to meet that competition. We have similar competition from Philadelphia to New York and Boston, and Philadelphia to the southern Atlantic ports, and even to the interior, where rates are published by the boat lines on a differential basis under the all-rail rates. So that is another reason why we have been called upon to perform this service of unloading and loading carload freight at certain of our stations in these cities, whereas at other points the service is performed by the shipper or consignee.

My testimony is related specifically to the exceptions to the general rule as to loading and unloading at the Baltimore & Ohio stations, where the service is performed by its own employes.

I have an exhibit showing the stations in the city of Philadelphia operated by our own employes, at which we perform this service, and the same exhibit includes the warehouse deliveries at which the same service is performed under contract.

Mr. Webber: We offer, Mr. Examiner, as exhibit No. 85, an extract from the exceptions to the Official Classification.

The Witness: With respect to our own operated facilities, I believe I am familiar with the general practices at those stations. With respect to the facilities of the warehouses, [fol. 554] the services of such warehouses are clearly set out in our contract with them. I do not know that it is necessary for me to enlarge upon that. I have, however,

been through the warehouses. I have seen their physical operation. I am familiar with their location.

The Witness: Exhibit 85 contains excerpts from our tariffs, lawfully on file with the Interstate Commerce Commission, showing the manner in which we have provided for the loading and unloading of carload freight at our own facilities at Philadelphia, and it also shows the manner in which we provide for the extension of the same service at certain deliveries of the Pennsylvania Warehousing & Safe Deposit Company.

It will be noted in the lower section of this exhibit that we publish in the tariff, that carload freight handled at warehouses of the Pennsylvania Warehousing & Safe Deposit Company, at their Delaware Avenue Stores, Moro Phillips Stores, 23rd Street Stores and Tobacco Warehouses, will be subject to the same rules and regulations as to loading and unloading as in effect at Pier 62, South Philadelphia, as per our tariffs I. C. C. 20570 and 21212.

All my information as to the history of the arrangements with the Pennsylvania Warehousing & Safe Deposit Company, and what brought it about is hearsay. I have discussed the matter with several of our officials and others. As the contract shows, the original contract, it was made in 1897, at the time the Baltimore & Ohio Railroad was in the hands of receivers. In fact the contract was made by the receivers.

At that time the facilities of the Baltimore & Ohio Railroad were limited, and the receivers were quite anxious to increase the facilities here in some manner, shape or form, [fol. 555] which would enable them to secure a much larger tonnage into and out of Philadelphia than had been handled. They found that there were a number of warehouses reached by the Pennsylvania Railroad and Reading Company which were a very satisfactory adjunct when it came to securing business. They also found that allowances were being made to those warehouses for services performed by them, and it was quite necessary and essential that they make a similar arrangement, and according to my investigation that led up to the contract with the Pennsylvania Warehousing & Safe Deposit Company. The amount of payment to the Pennsylvania Warehousing & Safe Deposit Company for the services performed at the several warehouses that I have mentioned is 50 cents per ton.

The operation of this plan at Philadelphia, in which we perform this service of loading and unloading at warehouses under contracts with these agents, has proven entirely satisfactory to the Baltimore & Ohio Railroad. The addition of these facilities to our own has enabled us to perform a service, or rather to give a service to commercial interests at Philadelphia which we would be unable to furnish otherwise. It has enabled us to meet competition, not only competition with the other rail carriers at Philadelphia, but a certain amount of competition with the boat lines as well. However, there is a certain point where we consider it not advisable to extend facilities. There must be a breaking point somewhere, and we believe our present situation as it exists, takes case of our requirements.

Examiner Brown: 84 and 85 are received and will be marked at this time.

Cross-examination.

[fol. 556] By Mr. Hickey:

These payments that I testified to are not published in any tariff which the Baltimore & Ohio Railroad Company has filed with the Interstate Commerce Commission, in which the Baltimore & Ohio states the amount of these payments in dollars and cents per ton.

Exam. Brown: I suggest that the witness make a definite statement whether or not these payments are or not published in any tariff of the Baltimore & Ohio Railroad?

The Witness: Well, so far as my knowledge goes, they are not published, if that is the answer you want.

J. E. Sands was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Webber:

I am terminal freight agent of the Baltimore & Ohio Railroad Company at Philadelphia. I have been connected with the Baltimore & Ohio about 40 years. I have held numerous

positions in freight station work and the operating department. I have been in Philadelphia seven years as terminal freight agent. As terminal agent I have jurisdiction of all the freight stations in Philadelphia. I think I have heard all the testimony in these proceedings.

[fol. 557] Q. Having before you exhibit No. 84, which Mr. Settle introduced, will you state at what stations shown on the exhibit, operated by the Baltimore & Ohio force, we perform the loading and unloading of carload freight—talking now about our own particular freight stations?

A. All pier stations on the Delaware River Front.

Q. Now will you state how the freight that is handled through those stations is received by the Baltimore & Ohio at Philadelphia—I mean to say how is it consigned, if you know?

A. You mean as to distribution among the stations?

Q. No, I mean as to the billing. Do you see the billing?

A. We handle the billing, yes sir.

Q. How are those shipments that are handled through any of those stations of the Baltimore & Ohio billed? Are there various ways?

A. They are usually billed to the station most suitable to the location of the consignee.

Q. Are they billed, for instance, to John Smith, Philadelphia, or some other way?

A. Usually to the consignee direct.

Q. Now do you have any that come in there to those stations on which you have standing instructions to make deliveries other than at the stations themselves?

A. Well, you mean that come into these stations that require other deliveries?

Q. Yes sir.

[fol. 558] A. Well, that is—usually that would be considered a matter of faulty operation on our own part in distributing our traffic as between the stations.

Q. What I mean, Mr. Sands, is this: You have a shipment one day that comes in for John Smith of Philadelphia, I take it?

A. Usually indicated either Pier 22, 62, 40, Pier 12 North or if we are familiar with the location of the consignee and

where he really desires the traffic handled, it is sent to that station.

Q. Do you have any shipments that come in there on which you have orders from the consignee to deliver at a warehouse?

A. You mean traffic that comes into Philadelphia? Q. Yes, we receive traffic intended for the warehouse.

Q. And is that consigned in care of the warehouse?

A. I would say in 90 per cent of the cases.

Q. Now the freight, first of all, comes into what yard, if it is destined to Philadelphia?

A. Well, it arrives in our break-up yard that we know as East Side.

Q. That is indicated on the map, is it not?

A. Yes sir.

Q. If it is consigned to John Smith, Pier 22, what happens?

A. We break up the train at East Side, distribute the traffic to the various stations, and a shipment consigned in care of Pier 22, is sent to Pier 62, from which point we do our floating up and down the river.

[fol. 559] Q. Is the route over which that would move, indicated on the exhibit?

A. Yes, it is.

Q. Well, is that the heavy black line running from the East Side yard, for example, to the piers?

A. Yes sir.

Q. Assume that you have a shipment that is destined to Philadelphia, consigned to John Smith, and Race Street Station is indicated on the map, what would be the route that that shipment would take?

A. That just happened to be a different classification. At East Side that traffic is pulled up and sent up the Schuylkill River to 24th and Race Street.

We receive carload freight, billed in care of the Pennsylvania Warehousing & Safe Deposit Company, at deliveries that are shown in exhibit No. 85.

It happens at times, that a shipment will come in, consigned to John Smith, Philadelphia, and we receive instructions from John Smith to deliver that shipment at one of the warehouses of the Pennsylvania Warehousing & Safe

Deposit Company. When we have shipments either consigned care of the Pennsylvania Warehousing & Safe Deposit Company, or ordered to the warehouse of that company by the consignee, our first act would be to carry out the instructions of the billing or the order; to send the [fol. 560] traffic to the designated warehouse and follow it up with the revenue billing.

A switching crew would take the car or cars to the designated deliveries. We would send notice of its arrival to the warehouse company. We would follow that with a regular freight bill and submit that to the warehouse too. The freight charge on such bill is collected by the warehouse company and is deposited for the account of the Baltimore & Ohio Railroad.

In the handling of these shipments at our own stations, with respect to the loading and unloading, we have our own employes. We furnish the supervision and the labor at such stations where we unload carload freight or load outbound carload freight. We furnish the supervision and labor and we perform the service, that is to say, the employes enter the cars and unload them.

Freight unloaded is unloaded and put on a—stored on the platform. Notice, of course, is then given to the consignee and delivery made as soon as possible.

For our loading out of a shipment from one of our stations, the operation is the same, except reversed. We accept it on the platform, and use our own labor and supervise it, load it and stow it in the car. Then it is sent out, properly billed.

Q. Now Mr. Sands, in the event that you are called upon to handle all these cars which are going into the Pennsylvania Warehousing & Safe Deposit Company warehouses over your platforms at your own stations, what in your opinion would be the result of that additional service?

[fol. 561] (This question was objected to by Mr. Hickey. Following argument of counsel, the Examiner permitted the witness to answer "for what it was worth.")

A. Well, it would be my opinion, due to the fact that we [fol. 562] have never had to anticipate such a situation, that we would meet with a congestion, because in the oper-

ation of a freight station, it is an active going concern, and freight has to move currently, and any congestion—any surplus amount of freight on the facility naturally retards your operation. There is a certain amount of clearance that we really figure that we have to have for a smooth operation of a freight station, for we clear up daily, and if we were to attempt to handle excess freight, creating a congested condition, it would be a serious matter with us.

Q. Would you have room for storage say for 48 hours at these several facilities, and then to handle the current business?

The Witness: That is rather difficult a question to answer. There are times when we are up to our limit at the present time. There are other times when we are not. I could not very well answer a question of that kind. At Race Street station I would say we are not able to store freight at the present time.

The prompt release of a car that has come in here for unloading is a matter of prime importance, so far as transportation is concerned. From my experience the result of handling shipments by the Pennsylvania Warehousing & Safe Deposit Company has been prompt, average release of cars.

Comparing the release of such shipments with the release of such shipments that are handled at team tracks, my experience has been this, that there is nothing to delay the releasement of cars going into the warehouse. There is not the formality to go through with that there is on cars handled through a team track. As an average there is more prompt release of cars at the warehouse than there is at team tracks.

[fol. 563] I saw exhibit No. 80 and had an opportunity to go through the forms that are included in it. Those forms, bills of lading, and so forth, are similar in language and conditions to the forms used by the Baltimore & Ohio for the same purpose.

Cross-examination.

By Mr. Hickey:

I stated that inbound cars of freight set at warehouses for unloading are released fairly prompt. That has been

our experience on such freight consigned to Mr. Bailey's warehouse and Mr. Gallagher's Warehouse. We don't serve the Terminal Warehouse nor John Wanamaker's Warehouse, nor Sears-Roebuck Warehouse.

Circular No. 799 of the Baltimore & Ohio Railroad Company shows the warehouses which the Baltimore & Ohio serves. It is a publication for that purpose. It is a list of the principal firms and industries in Philadelphia that we serve, either directly, and in some cases indirectly. It is a general circular of information used in our office, for the purpose of reference in locating the firms served. That is a circular that is frequently subject to change, and if kept up to date it does serve a very valuable purpose as a matter of information. It contains information enabling us to make appropriate delivery of the freight.

Inbound carloads of freight consigned for delivery at warehouses of the Pennsylvania Warehousing & Safe Deposit Company are not recorded regularly in our demurrage records, due to the fact that we recognize a warehouse—the Pennsylvania Warehousing & Safe Deposit Company, as an agency through which the traffic is unloaded.

We don't set up any demurrage against shipments to be [fol. 564] delivered at the warehouse of that company.

We do not serve the warehouses of the Philadelphia Warehousing & Cold Storage Company directly. I can not name the customers of the Pennsylvania Warehousing & Safe Deposit Company.

I have not gone around to those customers and ascertained to what points of delivery in the city of Philadelphia they would route their freight in the event that the Pennsylvania Warehousing & Safe Deposit Company discontinued business.

(Witness excused.)

Mr. Webber: Mr. Examiner; I want to offer, as I said I would do at this time, an agreement of 1897 between the Baltimore & Ohio and the receivers of the Baltimore & Ohio and Pennsylvania Warehousing & Safe Deposit Company, supplementary agreement which is the same year, bound with that agreement, and a further agreement of 1904, also made a part of the same document, and the agreement of July 1, 1911, which was merely an extension of the pro-

visions of the original agreement to cover the Delaware Avenue Stores and the Morro Phillips Stores.

Examiner Brown: You are offering two separate exhibits, are you?

Mr. Webber: Yes sir, as exhibits, the original agreement of 1897 and the two agreements bound with it, I would like to have marked exhibit 86, and the agreement of 1911 as exhibit 87.

Mr. Webber: I offer as exhibit 88, the agreement of August 2, 1926.

Examiner Brown: They will be received as defendants' exhibits 86 to 88, inclusive.

Mr. Bikle: Mr. Examiner, at the morning session I think Mr. Hickey or some one suggested that it would be appropriate to supplement exhibit 80 by specimen copies of the [fol. 565] order bill with accompanying documents. I have those copies now for distribution, and with your permission, I will file as exhibit 89.

Examiner Brown: It will be received and marked defendants' exhibit 89.

George M. Richardson was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Glasgow:

I live in Pitman, N. J. I am employed by the Merchants Warehouse Company in Philadelphia. My title is general manager and treasurer. I have been connected with that company about 13 years.

When I first came to that company I was employed as a special assistant to Mr. Miller, the president. I have held the position about four years. It is within the line of my duty to familiarize myself and I am familiar with the method of doing business and handling business, and the contracts between our company and the Pennsylvania Railroad Company.

The Merchants Warehouse Company has been engaged in acting under contract with the Pennsylvania Railroad Company for the delivery and receipt of freight in Philadelphia since 1887. At present at 12 points in the city of

Philadelphia the Merchants Warehouse Company has warehouses, used by it in carrying out the obligations that it has to the Pennsylvania Railroad Company, under the contracts which are now in evidence.

We find it necessary in the conduct of the business under our contract to have so many warehouses, at so many [fol. 566] different points in the city of Philadelphia as a matter of convenience to the consignees of that freight that we handle for the Pennsylvania Railroad Company under our contract. We have one in the Kensington district, and then one nearby in the Shackamaxon district. It is necessary to have a warehouse up there in the Kensington district because patrons of the Pennsylvania Railroad who require their freight delivered in that section, do business there. Otherwise it would require long distance hauls by the consignees or patrons if we did not have a point of delivery at those points.

The distribution of these warehouses all over the city is to promote economic delivery to the patrons of the railroad company of traffic and prevent the long distance haul from points of delivery. That is true also as to the receipt of traffic.

The kind of freight that goes through the several warehouses which we are conducting, and at which freight is delivered to us by the Pennsylvania Railroad Company is a general line of package freight, including canned fruits of various kinds and description, flour, feed, hay and straw. Not much furniture. Occasionally a car of furniture. It is the general run of all package freight that comes into Philadelphia pretty nearly.

When a car comes into Philadelphia on the Pennsylvania Railroad Company and finally reaches one of our warehouses, that car is billed to a consignee in our care. For example, to John Smith, care of Merchants Warehouse Company, designating the warehouse at which the delivery is to be made by the railroad. In other words, the purpose is to designate a warehouse convenient to where John [fol. 567] Smith is located. On a car which comes in billed to John Smith, care of the Merchants Warehouse Company, Shackamaxon Street stores, or other stores, billed that way, we receive the payment from the Pennsylvania Railroad Company for the service we render in accordance with the contract. If that car comes consigned or billed to the

Merchants Warehouse Company, we do not receive payment for any service we may render with regard to that car.

We do not receive a payment from the Pennsylvania Railroad Company for services we may render on any traffic in which the Merchants Warehouse Company has a whole or a part interest in the traffic.

I have here three typical billings that illustrate how those cars come to us, and the form of the billing.

Examiner Brown: They will be assigned interveners' exhibits Nos. 90, 91 and 92.

If we take a car coming into one of our warehouses, a full car, in which the billing is John Smith, care of Merchants Warehouse Company, and that car is received at our warehouse, we give the consignee named in the billing notice of the arrival of that car.

After it has been unloaded and stored by us as the agent of the Pennsylvania Railroad, under the terms of our contract, we send a proper notice to the consignee indicated on that billing. If the information we have is that the entire contents of that car is to be delivered to the man whose name appears in the billing, and to nobody else, when that car arrives at the platform of our warehouse we first make a careful note of the condition of the seals, and keep a copy of that seal record. The seals are then broken, the car [fol. 568] doors are opened, and an unloading crew and a checker will take those goods out of that car, package by package. The checker will keep a careful record of the condition of each package as it is taken out of the car, and loaded on what we call a small buggy or truck. We then transfer that freight to some convenient place in the warehouse. We there pile it, separate it for our own convenience.

Where the full carload is for one man and our information is that nobody else has any interest in it, if there was an assortment, we would separate it; that one man might have two or three brands in that car and we separate it into brands or marks.

We make report to the Pennsylvania Railroad Company, under our contract, as to the condition in which the goods are when they are taken out of the car on to our platform. It is necessary to examine each package in order to make

that report, otherwise we would not know. We put that freight in our warehouse at some convenient point, piled up, separated into brands or markings and then we notify the consignee that it is there for him or his orders.

It will remain at that point in the warehouse where we place it until delivery is accomplished. It remains at that point 48 hours, not including day of arrival, Sundays or legal holidays, before there is any storage charge that is made against the consignee. That is done in accordance with the contract that we have with the Pennsylvania Railroad Company. We store it free for 48 hours, after we have placed it in the warehouse. At the end of 48 hours, in case there is no demand on us for the immediate delivery to the shipper or to the consignee, that commodity stays there and [fol. 569] is held subject to our tariff charges as a warehouseman. It stays there for account of the consignee. It remains there at his convenience to accept the delivery. When he asks delivery, we would take those goods at the pile, pile them on little trucks or buggies, and deliver to what we would call the sill of the warehouse. That is where the truck is backed up which the consignee sends to receive the freight; we make a tail-board delivery.

For the services which we perform between the point that we receive the traffic into our warehouse and the point that it is delivered out to the tail-board of the truck if it is delivered when in the free time, we get no compensation, except the payment made to us for services rendered, by the Pennsylvania Railroad, namely, 50 cents a ton on some classes and 35 cents per ton on others. That is set forth in the contract.

Any other compensation which we get after the 48 hours is a question between us, or contract between us—our company—and the consignee, for the storage of it.

Suppose a car comes in to one of our warehouses, consigned to John Smith, care of the Merchants Warehouse Company, and after that car is unloaded we are informed in some way that parts of that commodity or volume in the car are for one man, to be delivered to one man, and part to be delivered to another, or to four, five, six or seven or 10 different people, we would and could only get the information that there are others than John Smith, as an illustration, interested in the commodity in that car,

from the consignee shown on the billing. We get the information from the consignee. We might get it in the form of telephone information, which is confirmed in writing, but as a rule we will receive written orders, either direct from [fol. 570] the consignee or presented by his driver.

Exhibits 90, 91 and 92 on local freight waybill to which are attached cards showing the classification of the commodity in the car are orders from the consignee named. They are typical shipments.

Mr. Glasgow: I offer as exhibit No. 90, Pennsylvania Railroad local freight waybill, in which the consignee appears A. E. Turner Company, Merchants Warehouse Company, R. F. S., Philadelphia, Pa., to which is attached a notice dated 5/23/28 from the Merchants Warehouse Company to A. E. Turner & Company, giving a report of the contents of the car, by cases, and the condition of the contents of the car, and the marks which are upon the cases in the car; and also attached to the waybill are eight orders in writing, dated 5/24/28, from A. E. Turner & Company, to the Merchants River Front Stores Warehouse, directing the person to whom the warehouse company was to deliver the goods contained in the car.

I offer as interveners' exhibit 91, Pennsylvania Railroad local freight waybill, in which the consignees appear to be Jessup & Roberts, care Merchants Warehouse Company, Delaware Avenue-Front Street, R. F. S. Philadelphia, to which are attached, just as to exhibit No. 90, the detailed notice to Jessup & Roberts as to the contents of the car, and nine orders in writing from Jessup & Roberts, directing the Merchants Warehouse Company to what persons to deliver the contents of the car.

I offer interveners' exhibit No. 92, which is Pennsylvania Railroad local freight waybill, upon which the consignee appears as Canada Dry Gingerale, care Merchants Warehouse Company, Delaware and Chestnut, and attached to the same is notice to the consignee Canada Dry Gingerale Company, as to the detailed contents of the car, and also at-
[fol. 571] tached to it five orders in writing from the Canada Dry Gingerale, Inc., directing the Merchants Warehouse Company to what persons to deliver the contents of the car.

The Witness: Exhibit No. 90 is a typical waybill as to the consignee and the contents of their cars that come to our warehouse from the Pennsylvania Railroad. Attached to that is a detailed statement, or a statement in writing as to the number of cases in that car and the contents of the cases. For illustration, the first item is 200 cases Perfection whole beets No. 10, and under head of "Remarks" is the following:

"MKD. Kern Prince" That means when our unloading crew unloaded those goods—unloaded that car, they found 200 cases of No. 10 beets marked Kern Prince & Company. Of course, we know that those marks "Kern Prince & Company" are put on those packages by the shipper, so that his consignee, A. E. Turner & Company, would know what packages to direct us to deliver on their order.

After we make up this statement, which follows along as to each group of cases, sliced beets and whole beets and other commodities, and the persons—and showing the marks, we send a notice to the consignee named in the waybill as to what the contents of the car was, in the form in which it is shown in exhibit No. 90, which is a verbatim copy. That notice also shows the condition of the packages in the car, as we found them upon unloading. A notation thereon shows that two cases of C. & C. sliced beets, marked A. Salus & Son, were swelled and leaking. That means we found two cases in a damaged condition of that particular mark and brand. We send to the consignee a notice on each car as follows:

[fol. 572] "We will insure this merchandise for two days at a valuation of $3,000. If not removed within two days, it will be stored, subject to tariff charges, and it will then be at the owner's risk as to loss or damage by fire, unless insured by the owner through this company." That notice appears on all notices of arrival. The only exception would be that the amount of insurance would change.

We give to the Pennsylvania Railroad Company, after we have unloaded the car, a notice or report as to the condition of the seals and as to the condition in which the packages are when we unload them. We do that every day at every warehouse on every shipment.

When a car comes in as in exhibit 90, marked with eight or more different markings on it, as soon as that car gets

to the platform, we break the seals of the car. We inspect the seals first then we unload that car. We put the commodities when they take them out of the car on a truck, then we move each truck as it comes out of the car to some convenient place in the warehouse, and there pile the goods. We put it wherever it is most convenient for us. The first platform might be congested, and it might be necessary, if we would assume that any portion of those goods would remain in store after the expiration of that free period, we would have the advantage of the goods being placed permanently in the store, at some convenient spot for us in the warehouse, and thus save us the expense of moving it or rehandling it.

If we have knowledge that that is certain to be taken out by the consignee within the 48 hours, we place it in the warehouse at the most convenient place for ourselves in order to make expeditious delivery.

After we get those little trucks on which we pile the goods [fol. 573] into the warehouse, we would separate the packages as to marks and sizes, and pile them in the warehouse for our convenience. For instance, as to exhibit '90, our men get 200 cases out of there, Perfection whole beets No. 10, marked Kern Prince & Company, and pile them in one pile, and 100 cases of C. & C. sliced beets No. 10, marked A. Salus & Company and pile them in another pile. That is all the way through until we have piled all the commodities in that car.

Now, the first of the wrrit-en orders in exhibit 90 is addressed to our company and it says—this ordered us—deliver to Almar Stores Company or order, 100 C. & C. sliced beets, 100 Perfection beets—whole beets. That order may come direct from Mr. Turner, or it might be presented by Salus & Company's driver, on Salus & Company's Almar Stores. However, the order in writing from Turner is either directly to us, from him directly, or by the man who drives up there with a truck to receive the beets. When we get that order, we make delivery. The order is prsented first to our general office, and the record is checked to see if it is in keeping, and checks with the billing of the car, and then we issue what we call a written authority, or warehouse order, directing the foreman to make that delivery.

That driver is given that warehouse authority and he gives it to the foreman after he backs his team into the platform. In other words, we deliver the order to the foreman of our warehouse, to deliver the beets called for in the written order of Turner to the fellow that presented that order.

The foreman goes into the warehouse to the pile in which the marks are Almar Stores and he or men under his direction take out from the part marked Almar Stores the amount called for by the order. He makes tailboard deliv-
[fol. 574] ery, from that pile marked Almar Stores. That is all the way through all of the shipments that appear in that car as it is reported here and it is all carried out the same way. At the end of two days if we have not received orders and delivered to the tailboard of the truck all of the shipment contained in that car, the balance of it is held right there where it is originally stored, subject to the order of that consignee. And in accordance with the notice, it goes on storage as a warehouseman. We have to examine each package as it is unloaded, to determine its condition. They are examined as they are taken from the car and put on the truck, and upstairs they are separated and piled according to the classification as to marks upon them to which I have referred.

Nobody pays us for the service of separating them into piles, we are not required to. We do it is a matter of our own convenience. It would be an accommodation to our patrons of our warehouse in this way: When we don't make a charge, it is to their advantage, of course. When we separate it that way, there is an anticipation that part of it may thereafter go into storage. It not only becomes our convenience to do it that way, but also for the further reason if we would pile the contents of the car together—an assorted car of canned fruits, as an illustration, the following day whoever the consignee might be would send us an order, directing us to deliver 200 cases of that car—if we separate that car when we unload it, we save ourselves the expense of breaking the pile and thus being able to make delivery in accordance with the terms of our contract with the Pennsylvania Railroad.

In other words, if Mr. Turner is going to order out any of
[fol. 575] that contents of the car for delivery, we in order to honor his order, would either have to separate it when we unloaded the car, or separate it when we got the order.

The Pennsylvania Railroad Company under its contract with us does not pay us for that service of separating and we are not required under that contract to make that separation. But we do it for our own convenience.

The service we render to the Pennsylvania Railroad Company, for the Pennsylvania Railroad Company, for which we are paid the 50 cents a ton or the 35 cents a ton provided in the contract is that when the Pennsylvania Railroad places a car on the tracks, we examine the seals; we break them; we keep a careful record of the condition of those seals; we unload that freight; we keep a careful check of its contents and condition; we store that freight for the account of the Pennsylvania Railroad for a period of 48 hours. We assume responsibility for its care and custody. We make delivery and we insure it during that free period.

We make delivery in accordance with the terms of our contract, if the consignee calls for the freight within the free time as prescribed by the tariffs.

For the payment which we receive from the Pennsylvania Railroad Company for the traffic handled, of which exhibits 90, 91 and 92 are typical instances, as well as the carloads that I have referred to, in which the entire contents go to one person—for that compensation of 50 cents or 35 cents, our company renders the services which I have indicated, pays for the insurance which I have indicated, and furnishes to the Pennsylvania Railroad Company for its purpose, [fol. 576] storage during the 48 hours, the space and the facilities I have detailed in our warehouse.

In connection with claims for damage against the Pennsylvania Railroad Company on account of damage to the commodities in the cars that come to our warehouse, or their condition, we render any service to the Pennsylvania Railroad Company in connection with claims that are brought on such damage claims, we file claim papers covering that. For instance, take on exhibit 90, two cases swelled and leaking.

On exhibit 91, one case of red kidney beans received with only 16 tins in the case.

No. 92, Canada Dry Gingerale, 33 cans damaged, reconditioned to a loss of eight cases.

We report all of that to the Pennsylvania Railroad the day the car is unloaded and if any damage claims were filed

with regard to those items we discharge service to the Pennsylvania Railroad under our contract.

First, this is something I overlooked: When that car is unloaded, our coopers would try to recondition these packages and place them in condition where the consignee would be willing to accept delivery. In a great many cases we are able to reduce claims on canned foods to a minimum. We make no charge for the service of those coopers.

We are not required to do it under our contract with the Pennsylvania Railroad. We feel that is an obligation upon us. Now we make this report, as I stated, to the railroad company. In due course, if a claim is filed by either the consignee or the shipper, that file of claim papers would come back to us for verification, and we invariably attach copies of the original unloading records, reports as to why [fol. 577] we thought the damage occurred and so on.

We never file claims in our own name on goods consigned to our warehouse, in care of our warehouse.

When that car comes and the freight has not been paid at initial point, the Pennsylvania Railroad collects the freight on these cars which is due to the Pennsylvania Railroad Company direct from the consignees, freight charges assessed on cars consigned to parties on what they call their credit accommodation list. In the event that a consignee is not on their credit accommodation list, they may collect direct, or they may direct us to hold that car, pending payment of the freight charges.

We sometimes collect the freight charges for the Pennsylvania Railroad Company and account to the Pennsylvania Railroad for the collection. The amount of freight we collect for the Pennsylvania Railroad Company as its agent on account to them for it is so small as to be negligible. As an illustration, Mr. Funck, I think, testified that he had made an investigation, and he made a report as to cars for a period September 1st to September 22nd. I think he testified to that fact yesterday. I had no opportunity to make a check all over the city, but I did check one of our very big warehouses along the River Front, I should have stated, and I found that in all that time we only collected the freight charges on two cars, of all that traffic. The traffic was approximately 700 cars. For the Pennsylvania Railroad we collected the freight on two.

We did that by reason of our appointment under the contract we have with the Pennsylvania Railroad Company. [fol. 578] That is a contract obligation.

Q. Now, Mr. Richardson, some reference has been made by counsel for the complainants here about your having—the warehouse company having been paid the amounts referred to in the contract with the Merchants Warehouse Company, upon some cars of freight which were unloaded by the warehouse company, on tracks not at the warehouse company, is that correct?

Mr. Hickey: I ask that the question be corrected. I did not say they were unloaded by the warehouse company. If you leave out the words "The warehouse company".

Q. Leave out by the warehouse company, if he wants to, and I will prove whether it was done by the warehouse company, so unloaded on the tracks. Is it a fact that you were paid on some cars unloaded on tracks?

A. Yes, sir. They were unloaded by our people.

Q. How did your people get to unloading on the tracks—how did it happen?

A. Well, take one example that I know of. I think the Kensington district was mentioned yesterday. All of those warehouses are served by the Pennsylvania Railroad tracks that you must pass over to reach the l. c. l. station of the Pennsylvania Railroad. As an illustration, Shackamaxon Warehouse, it has a siding capacity, I think, of five or six cars, according to the length of the car. After those tracks are once set up in the morning and we have our unloading plates down, the consignees may come and ask us to make delivery of a car it is impossible for us to place at our warehouse siding just at that time, without breaking up [fol. 579] the entire operation.

It is impossible for us to arrange for the Pennsylvania to break that track and put another car in, on account of the difficulty of shifting in that district. Therefore, we have detailed men from the warehouse to go out into the yard and take a portion or all of the car, and make tailboard delivery to the consignee.

We make there the inspection that is necessary to make upon breaking the seals of the car exactly the same as if it had been in the warehouse. The work is exactly the same

as if it had been in the car except that it does not pass on the platform of the warehouse.

If we deliver only part of the car in the yard, instantly that the delivery was accomplished of the portion of the car which we actually did deliver, we would close those doors, seal them and the railroad would place that car at a convenient time during the day or following day at our warehouse. And the remainder of the car would be handled through the warehouse, just in the method that I have gone through.

We send a bill to the Pennsylvania Railroad Company for our contract account for the services we render in unloading the car at the yard under the circumstances and conditions I have detailed, on the cars that I have indicated which were unloaded in the yard. We collected money on some cars under the conditions I have outlined.

Subsequent to that time, the Pennsylvania Railroad Company made a further investigation of the billing which we had made to them for the cars—for the services with the result that they billed all those charges back to us and we paid the bill. As a matter of fact, the Pennsylvania Railroad Company took the position with us that the tariffs [fol. 580] were not broad enough to cover that, and required us to pay the money back.

Under the terms of our contract, we are required to receive freight which is delivered to us under the terms of our contract with the Pennsylvania Railroad Company, for loading and shipping over that line. That traffic is received by us at what we call the sill or receiving doors of the warehouse. The shippers would bring it there with their trucks. They usually bring shipping papers and direct us to load that freight. The shippers make out the bills of lading and they present that to us along with the commodity or traffic that is to be shipped. It might not always come with the first load, but come in the day's business. Then when we get the traffic on our platform and we get the shipping instructions, and the bill of lading prepared by the shipper or consignor, we would take that freight off the platform and place it in a car, properly stow it. We would arrange for the car to be spotted through the usual channels.

We would make that arrangement with the agent hav-

ing jurisdiction—agent of the Pennsylvania Railroad. Then when the car is spotted at the siding at our warehouse, we would load that freight, and properly stow it, seal the car, take the bill of lading to the agent having jurisdiction, who would sign it; we would then deliver the signed lading to the shipper.

We keep a very careful tally of the commodity to see whether it corresponds with the bill of lading. If it was damaged freight we would make a report of it. We make a report to the Pennsylvania Railroad Company as to the condition of the freight when we receive it and put it in the car.

[fol. 581] The notation on the lading would indicate that. That is done every day. For the service which we render in receiving it, checking it, examining it, loading it and the storage just prior to loading, reporting and sealing the cars, we get a compensation from the Pennsylvania Railroad.

Of course the use of our facilities are included in that contract, not only for the actual work we do, but the use of the facilities that we have there in the form of our warehouse. That compensation is provided for under the contract. That compensation is 50 cents per ton, at some locations; and 35 cents at other locations.

We do not get any compensation from the Pennsylvania Railroad Company for our services in connection with traffic which may be billed to the Merchants Warehouse Company, Philadelphia, or on traffic in which our company has any interest whatsoever.

During the month of July, which was the time this case was called for hearing in Washington, I made or had made a very careful survey—very careful check of the records at four of our warehouses, with a view of determining what percentage of the total traffic handled was delivered within the 48 hours free time. I found that we delivered in some instances, at some locations, 35 per cent of all the inbound tonnage within the free time; at other locations, 75 per cent, including outbound tonnage—the total tonnage handled inbound and outbound.

[fol. 582] Mr. Hickey: If the Examiner please, I object to all this testimony about the free time, and move that it be stricken out, on the grounds that Mr. Glasgow has not established a certain or definite free time, which he or the

witness may characterize as the free time. There cannot be any free time in these privately operated warehouses.

Exam. Brown: Explain to the witness what you mean.

By Mr. Glasgow:

Q. When I speak about free time,—I thought I was talking about something that everybody knew. I mean when I speak of free time and you speak of free time, the 48 hours which is provided, that the traffic will be held by the Pennsylvania Railroad Company at its terminals, without any additional charge over and above the freight rate.

A. And which free time is provided for in these contracts.

Q. And is that the free time referred to in these notices that you give to the consignee, that the merchandise will remain stored with you, without an additional charge, for two days?

A. Yes sir.

Mr. Hickey: I do not want it to appear that I withdraw my objection after what Mr. Glasgow said. My position is that when the Pennsylvania Railroad Company delivers a carload of goods to the only concern that it can deliver it to, there can be no free time. There is absolutely no free time, and my position is there is no free time in this case.

Exam. Brown: Your remarks appear of record. That is one of the points to be argued in the brief. This evidence [fol. 583] will be received, subject to your objection, with the privilege on your part to argue the point in your briefs, if you wish.

Mr. Glasgow: I just want to remark that free time, I understand, to be time in which the commodity will remain in the custody of the carrier or its agent, without any additional pay over and above the freight rate or demurrage.

Exam. Brown: That is a matter to be argued out in the brief.

Mr. Glasgow: I say I understand that to be free time. Mr. Hickey says there cannot be free time, and my reply to that is as a fact there is free time.

[fol. 584] By Mr. Glasgow:

Q. Now, some complaint was made, as I understand, by Mr. Anderson, at Washington, that the millers had no notice

when flour that his clients were interested in, went into storage with you at your storage tariff rate.

Mr. Hickey: I object to Mr. Anderson's testimony being described that way.

Q. Have you adopted any method since that time of giving the millers notice when it comes into your warehouse for storage with you under the tariff rates as a warehouseman? When I say millers, I mean the consignors or shippers of the flour.

A. Mr. Glasgow, we haven't actually sent any notice to any shipper or consignor, but that question is under consideration, and has not been finally passed upon. We are quite willing to send any notice, so far as we have the legal right to forward that notice, that will give the shippers or consignees any information they want about the status of that shipment.

In connection with the handling of the traffic at the several warehouses of our company, to which I have referred. There is nothing done by us, except at the request or under our obligation to the carrier under our contract, or at the request of the consignee named in the billing.

By Examiner Brown:

Q. Are the services rendered by the Merchants Warehouse Company any different than the services rendered by James Gallagher, and the Northeast Warehouse Company, Walter A. Bailey Terminal Warehouse Company, or the other complainants in this case? If so, I wish you would draw a distinction if you can.

[fol. 585] A. Mr. Examiner, the representatives of those warehouse companies, especially Mr. Sullivan, testified to a lot of things that he does that we don't know anything about.

Q. Well, for example?

A. As I recall his testimony, he operated sales departments; he rendered a lot of services for consignees and for shippers that we do not do. I have related to you exactly what we do. What they do, I cannot tell.

Q. Do you know within your knowledge whether or not the services you render these shippers are not rendered by those other companies?

A. I cannot answer that.

There is certain space in our warehouse which is leased to certain people in Philadelphia, for a term or for a year, or for a period. Probably 15 or 20 tenants have leases or space in our warehouses—probably 20 in all of them together—scattered over all of them. Those people are constant patrons of our warehouse for storage.

As a matter of policy we at times have agreed to reserve certain space in our warehouses that we do not need to perform the services required by us under this contract as agent of the Pennsylvania Railroad Company, and we lease that space to desirable patrons. That is not an unusual thing with warehouse companies—it is part of our business, and they pay an aggregate price for such space as we allot to them, and which space we allot on the basis to not interfere with the service we have to perform for the Pennsylvania Railroad. We allow them to put up a sign, showing that they have space there. We allocate space to them, isolated from the space which we operate as an agency of [fol. 586] the Pennsylvania Railroad. We have nothing to do with it after that.

Philadelphia, Pa.,
October 10, 1928—10:00 o'clock A. M.

Met pursuant to adjournment before Examiner Brown.
Appearances: Same as before.

[fol. 587] Mr. Glasgow: I have the complete list of the stockholders of the Merchants Warehouse Company. I submit that to you for your use, or for the Commission. I do not think Mr. Hickey or the competitors of this company ought to have a list of its stockholders. I am raising no objection, but the Commission, having it, I think it will be clearly recognized that the company's stock list it is not desirable should be a matter of public record or public property.

Examiner Brown: If you do not care——

Mr. Glasgow: I will give it to you, and for the Commission's use, if desired.

Examiner Brown: If you do not care to file that stock list as an exhibit, serving notice on the parties here, I do not believe it would be well to have it in the record. How-

ever, would you object to stating for the record the majority control of the company?

Mr. Glasgow: I would state on the record that there is no majority control, but that the largest stockholder—individual stockholder is the Pennsylvania Railroad Company, having 1240 shares out of a total of 6,942 shares. I will say further, that there are four pages of lists of stockholders, running from one share up to 773 shares held by one man.

Examiner Brown: Are there any other carriers holding stock in this company?

Mr. Glasgow: I think not, sir. I don't know that Mr. Hickey wants it, but he will recognize immediately that we don't like this to be public property.

Mr. Hickey: I have not asked for it.

[fol. 588] Examiner Brown: The record is clear enough in that respect. I will not ask you to file that list, inasmuch as you do not wish to serve notice on the parties.

Mr. Glasgow: Now let me state of record, Mr. Examiner, that if you or the Commission in the consideration of this case deem it desirable at any time to have a complete list of the stockholders, with any information as to the identity of any stockholder thereon, upon notice to me or to the company, it will be immediately furnished.

Examiner Brown: I might say in response to that statement, that nothing will be considered in this case which is not a formal part of the record in this proceeding.

Examiner Brown: The exhibits offered by this witness will be received as interveners' exhibits Nos. 90 to 92, inclusive.

GEORGE M. RICHARDSON resumed.

Cross-examination.

By Mr. Hickey:

As to how many of the warehouses of the Merchants Warehouse Company are owned by the Pennsylvania Railroad Company or its subsidiaries. I will name them having in mind those where the railroad company owns both land and structures, and those cases where it may own the land or the structures, but not both:

The Kensington warehouse, ground and property, is owned by the Pennsylvania Railroad Company.

Shackamaxon Stores, the ground is owned by the Pennsylvania Railroad Company, the property by the Merchants Warehouse. The warehouse company don't own the tracks that serve the warehouse.

Federal Stores, ground and property and facilities, [fol. 589] owned by the Pennsylvania Railroad.

15th and Carpenter, ground, building and facilities owned by the Pennsylvania Railroad.

West Pennsylvania, ground, buildings and facilities owned by the Pennsylvania Railroad.

I mean, when I say facilities, the tracks. That is what I understood Mr. Hickey to say—he said eyerything above ground. I mean the tracks.

When I say West Philadelphia, that is a good illustration. The Pennsylvania Railroad Company own the building, and so forth; it owns the sidings; it owns the platforms; it owns every physical thing in connection with that property.

I have described five separate properties. As to how many separate properties the Merchants Warehouse Company operates as warehouses, we designate the operation as 12 properties.

We don't own all the properties we operate. We lease some of them, but all of the sidings that serve all the warehouses—I say sidings—I mean railroad tracks,—are owned and maintained by the Pennsylvania Railroad to the best of my knowledge.

I think the division is 5 and 7, either owned by the Pennsylvania Railroad or owned by us or leased by us. That means that the Pennsylvania Railroad Company does not own the buildings or the land in the other seven that I have not mentioned.

I stated my position in the service of the Merchants Warehouse Company. I am also a member of the executive counsel of the Philadelphia Board of Trade, intervening in this case. I am also on its committee on foreign and coastwise commerce.

[fol. 590] Mr. Phillip Godley is not employed in the service of the Merchants Warehouse Company and he was at no time in the service of the Merchants Warehouse Company.

I am also vice president of the Commercial Exchange,

Mr. C. Herbert Bell is not and never was at any time vice president of the Merchants Warehouse Company. He is not on the Board of Directors of that company and never held any official position with that company and never was in its service at any time.

I was speaking of the freight charges on freight delivered at warehouses of the Merchants Warehouse Company, and the charges collected by the Pennsylvania Railroad on those shipments, and the charges collected by the Merchants Warehouse Company on some of those shipments. I didn't give any consideration to the inbound shipments billed prepaid. I would not attempt to give an estimate of the proportion of the inbound shipments that come billed prepaid without reference to the billings. I have not looked into it.

We have 16 or 20 tenants. I am not sure, and that, of course, is subject to verification if it is important. All of these tenants we leased specified space to in the individual warehouses of the Merchants Warehouse Company.

We present some papers and writings to the Pennsylvania Railroad Company, every month, for this compensation or payment on inbound shipments to the Merchants Warehouse Company. We present it once a month. We call that paper writing a bill rendered for the service of unloading and for all services with respect to the unloading, the care and custody, the checking and the delivery of freight, as provided by our contract.

[fol. 591] As to what I call the entries on that paper writing and whether they are charges, or claims, or allowances, or what, I think the bill is in evidence. I don't recall the exact wording. I don't characterize them in any way. I don't recall what is on one of the bills. I cannot identify the entries on that bill in any manner without reference to the paper. Ever since I have been with the company, which is a period of 13 or 14 years, to my knowledge, those bills are prepared. I cannot repeat the first entry that appears on those bills.

We render a bill for services honestly rendered, with respect to the receipt and care and custody, the delivery of freight to the consignees shown on the billing, under our contracts with the Pennsylvania Railroad. They are bills representing, as I have stated, compensation to which we

are entitled under our contracts with the Pennsylvania Railroad, for services honestly rendered.

My estimate of the aggregate of those bills for the year 1927 is approximately $200,000. Possibly that is just a little in excess of the figures. That covers all the warehouses, the Merchants Warehouse, all of our operations, in one year, 1927.

In our Federal Stores, we lease space to a tenant named the Vacuum Oil Company. On inbound shipments for the Vacuum Oil Company, after the car is opened, and after we have made a careful record of the condition of the seals, an unloading crew would be detailed to take those packages out of that car. They would be put on trucks or buggies, and then either delivered to the space which is isolated from that part of the warehouse to be utilized for the storage of freight as agent of the Pennsylvania Railroad Company, or we would store it in what we call space reserved [fol. 592] for consignees, known as the general public, and hold it subject to their orders covering distribution or delivery.

The Williamsport Wire Rope Company is another one of our tenants and the Rossville Company. They both have a very small amount of space.

John B. Ashtell & Company is a tenant of the West Philadelphia warehouse, but I would say that the character of service is entirely different. John B. Ashtell & Company receive freight that I think is classified as bulk freight only, and under the tariffs of the Pennsylvania Railroad they don't undertake to unload that class of traffic in Philadelphia, and necessarily we would not be required to unload that freight and we would not receive any compensation from the railroad.

The service we perform is anything that Ashtell would employ us to perform. We might unload the car, and we might not. However, we would of course keep a record of that car, its placement on the siding, and the date it was placed, and when it was unloaded, and submit that report to the Pennsylvania Railroad.

The services from the time the cars are unloaded, when we do unload the cars, are that we would deliver the freight in the space as and when directed by Mr. Ashtell or his representative. I would not say similar to my description

of placing it in space for the Vacuum Oil Company. The difference is:

In the Vacuum Oil Company we would make delivery on trucks to their space. In other words, we would take that little truck and bring it up to the elevator and there at that space we would make that delivery at that man's space. In West Philadelphia we feel that we would have the right to [fol. 593] go in a space and pile or do anything that man wants us to do that he pays us for.

At our Kenilworth Stores, C. G. Justice Company is one of our tenants. They have a small amount of space. We don't do anything for that tenant unless he directs us to store a shipment consigned to him in that section of the warehouse which is reserved for consignees we know as the general public.

Q. Will you describe what you do on the freight, from the time you take it out of the car, until you place it on the space for the C. G. Justice Company, or otherwise dispose of it?

A. From the time the car is placed on the Pennsylvania Railroad tracks that serve our warehouse?

Q. Yes.

A. We would break the seals after making a careful note of their condition. We would detail men to unload that car. The packages would be taken out of the car, a careful record kept of that contents and condition. They would be placed on buggies and then transferred to the space we have under contract as tenants with them, or we would store and pile that shipment in that portion of our warehouse reserved for the general public, and hold that shipment subject to their orders covering delivery.

I regularly solicit business for the Merchants Warehouse Company, that is my job, and I solicit these leasing arrangements referred to—that is the arrangement with these tenants. I would assume that responsibility subject, of course, to the approval of our Board of Directors and executive officers.

[fol. 594] Sometimes I enter into leases or agreements in writing as to the space they occupy, sometimes not. I have in mind now the conditions under which they occupy this leased space, and I know the character of the business they

conduct, if they do conduct any business in this leased space.

The business the Justice Company conducts there is receiving shipments of tomatoes—green tomatoes, sometimes they originate in California, sometimes in old Mexico, and then as the season advances and changes, the movement is from nearer points, sometimes south, sometimes Arkansas. They bring those tomatoes to Philadelphia, and after we make the delivery of the packages to them, their people in some way separate them and take care of them,—ripen them. That is all we know about that. They don't can them there—I am sure of that. When it comes in some part of it may be green. They call it fruit. They make delivery themselves to their customers in Philadelphia. Trucks come to the warehouse. They may be out of town customers. I assume they are.

At our River Front Stores we lease space to the Sherwin-Williams Company. That company is engaged in the paint business. They don't have a great deal of space. They use part of it, I think, to store the freight we deliver to them as agents of the Pennsylvania Railroad, and they use, I think, part of the space for the purpose of handling their correspondence, meeting their salesmen, accounting and work of that kind.

Q. Mr. Richardson, why have you repeatedly in your answers to me inserted that statement "as agents of the Pennsylvania Railroad Company?"

The Witness: That is an accurate statement of fact. [fol. 595] That is exactly what we do.

There is a man named Godley who is employed by the Merchants Warehouse Company. His name is Francis D. Godley.

By Mr. Campbell:

Q. Assuming that a shipment of flour was shipped by a miller on uniform order bill of lading, similar to the one that Mr. Bikle presented here—that is, the blank similar to the one he presented here, and that shipment, say, the name of the concern was John Smith, to the order of themselves, notify John Doe, Philadelphia, care of Merchants Warehouse Company, and that shipment was received at one of your warehouses in Philadelphia, what would you do with

that shipment, the same as you would do with any other shipment?

A. After that shipment was placed on the Pennsylvania Railroad tracks that serve our warehouse, our obligation to the railroad under the contract would be to unload that car, to keep a careful check of its contents and condition, make that report to the railroad, store that flour for a period of 48 hours, insure it, notify the party to whom the delivery should be made, and then hold the car subject to any lien for freight charges which the Pennsylvania Railroad might have, and subject to the surrender of the original order bill of lading, properly endorsed.

If that car were delivered to the notify party within 24 hours after the date of its arrival, there would be no storage charge on it from our company and during that time we would hold that as agent of the Pennsylvania Railroad Company, according to my understanding. After the 24 hour period we would continue to hold it in the same capacity for a further period of 24 hours, which does not include date of arrival, Sundays or legal holidays.

[fol. 596] After the so-called free time has expired, we are holding that car as a warehouseman for account of the owner, subject to a lien of the Pennsylvania Railroad for any freight charges and the surrender of the original order bill of lading, properly endorsed. I would characterize the owner of that car as the man who had that original order bill of lading. I said after the 48 hour time we hold it for the owner—that is, we store it for the owner. The owner would be the man who owned it, or who at the time had the title to this uniform bill of lading. That is the man I would recognize as the owner. We would not have any way of knowing where that bill of lading was, until it was filed with us, but after this 48 hours time, we do not hold it for the railroad company, we hold it for the owner, as warehousemen.

Of course, we recognize the owner as the notify party, the party to whom we understand delivery is to be made according to that billing. We hold it subject to the order of the owner, whoever that may be,—the notify party. We notify the party indicated on the billing we receive to be the notify party.

Totally aside from our contractual relationship with the railroad company we are a public warehouse. We are sub-

ject to whatever laws there are regarding public warehouses.

Assuming one of these shipments gets in our warehouse after the 48 hour period, or whatever length of time, we are required under the law to hold that freight a reasonable length of time. In Pennsylvania I think the reasonable time is generally to be assumed one year, and then we must not make any disposition—any sale of that shipment, until everybody indicated on the billing who might have a bene-
[fol. 597] ficial interest, is notified, and after advertising properly in accordance with the law.

Redirect examination.

By Mr. Glasgow:

Five of these warehouses—practically all five of these warehouses—the ground on which the building is located—the building, the tracks and the platforms where the freight is received, belong to and are property of the Pennsylvania Railroad. I think those warehouses were built by the Pennsylvania Railroad, but I am not sure of some of the older ones. They are all owned by that company and the property is owned by the company, just as its freight stations are owned by the company, and the only difference is that we, under contract, perform the services I have indicated for the Pennsylvania Railroad.

The others are either owned by us for the performance of this service, or we lease them from somebody else who owns them, for the performance of this service.

On the five properties owned by the Pennsylvania Railroad Company, the Merchants Warehouse Company pays to the railway company a rental for the use of them as provided by the contracts which are in this record.

By Mr. Hickey:

Q. I show you a list of names. (Later offered as exhibit 99.) Do you recognize those names as tenants of the Merchants Warehouse Company?

A. I recognize all the names on this list you have just shown me, as tenants of the Merchants Warehouse Company, except William A. Huey, who leases office space only at our West Philadelphia Warehouse.

Mr. A. Goldman occupies space that we have under contract with him. That is isolated entirely from that section of our warehouse which we utilize as space for the Penn- [fol. 598] sylvania Railroad under the provisions of our contract.

Livingstone Brothers occupy office space in our West Philadelphia warehouse and also have a small locker space, 25 feet by 25 feet, which they utilize for the handling of small broken lots of their products.

WARREN T. JUSTICE was thereupon recalled as a witness and, being first previously sworn, further testified as follows:

Direct examination.

By Mr. Barnes:

I have been connected with the Pennsylvania Warehousing & Safe Deposit Company for a period of 25 years. For the sake of convenience, I refer to our company as the Pennsylvania Warehousing Company. My present position with the company is general superintendent, and as general superintendent, I oversee the operation of all the warehouses of the company.

This is a map of Philadelphia and vicinity, and shows the location of the warehouses of the Pennsylvania Warehouse Company.

I am familiar with the terms and provisions of the contracts between our company and the Baltimore & Ohio Railroad Company, and between our company and the Reading Company with respect to the terminal services.

These contracts antedate my connection with the company which is a period of 25 years.

It has been a part of my duties as the general superintendent of the Pennsylvania Warehousing Company to oversee the operations of our company under those contracts. The terminal services rendered by our company to the Baltimore & Ohio Railroad Company, first, with respect to inbound freight and outbound freight under the contract [fol. 599] with that carrier are as follows:

The cars are placed on the siding of our warehouse. We inspect and break the seals, and open the doors, unload the

cars, tally the contents, watch out for damage, record the damage or overage or shortage to the railroad company, insure the goods, store them for a period not exceeding 48 hours, and collect the freight. On the outbound freight we receive the merchandise, tally it and inspect it for damage, load it in the car and seal the car.

In the case of the Reading Company, our services are just the same with respect to the inbound freight, and with respect to the outbound freight our company renders no services.

There are eight distinctive services so rendered by us. With respect to the unloading of the cars, the cars are placed on the track. Our unloading foreman goes around and makes minute examination of the seals, takes a record of the seals in his book, and supervises the unloading, the tally of the contents, watches out for the damages and makes notice of that. We make a report to the carrier with respect to the condition of the seals only in the event they are broken or in bad order. In the event of damage to the freight or overage, or shortage, the railroad is notified on forms provided by the railroad. We send arrival notices out on the merchandise. It is our Pennsylvania Warehousing & Safe Deposit form.

We hold the freight for a period not exceeding 48 hours. By that I mean we provide the space in the warehouse, take the merchandise to that space and hold it there, if it is not claimed by the owner, for a period not exceeding 48 hours. When the freight is claimed by the owner within 48 hours we [fol. 600] make no charge to the owner for that service because it is under the contract with the carrier. That is true in the case of the Baltimore & Ohio, as well as the Reading Company. We make collection of the freight charges. That is a provision found in our contracts with both companies. Our method of operation in the collection of those charges is that upon receipt of a freight bill—upon receipt of a car, the carrier sends a freight bill to us. We place a stamp on it, "Please draw checks to the order of the Pennsylvania Warehousing & Safe Deposit Company, remit to 113 South 3rd Street," and that original freight bill that we receive from the carrier is forwarded on to the owner of the merchandise.

In addition to these services which I have enumerated, as a part of our responsibility and obligation under the con-

tracts, we provide the facilities and the buildings, at a large expense, to accommodate those shipments we receive under our contract with the carriers. For the performance of these services, and for the use of these facilities, the Baltimore & Ohio pays us 50 cents per ton on inbound and outbound shipments.

The Reading Company pays us 30 cents per ton on merchandise with the exception of newsprint paper, on which they pay us 15 cents per ton.

The Reading pays us nothing on outbound.

The Reading pays only on the inbound carload freight shipments.

In my years of experience, going back over 25 years with this company, I know of no single instance where our company has received any payment from either one of these carriers, on any cars—car or cars in which it had ownership of the freight contained therein.

[fol. 601] As a matter of fact the Pennsylvania Warehousing & Safe Deposit Company does not receive any shipments of carload package freight or make any such shipments. The only thing billed to it which it does receive is coal from mines in Pennsylvania and that is for its own use and consumption, and those are the only shipments that come into that company.

There is no payment received from the carrier on coal, that, of course, is at the bulk rate.

With respect to the handling of this carload package freight, we always receive the instructions, either from the carrier or from the owner of the merchandise. These instructions are received by messenger, by mail, by telegraph or by telephone, to be confined in writing. We never take any goods with respect to this freight, except upon instructions so received.

On a typical waybill where the freight is received, with a waybill reading, John Smith, care of Pennsylvania Warehousing & Safe Deposit Company, in such case we would make collection of the freight charges from John Smith and that is true in every case. The Pennsylvania Warehousing Company on its own account never makes payment of the freight charges. We never make collection of the freight charges from more than the one individual named on the waybill.

When freight is received at our warehouses, and we are unloading it, we make separation or segregation of it for our own convenience. We are not obligated to make that under the contract. We just do that for convenience in delivery.

I have not made a detailed investigation of what proportion of this freight coming in, moves out in that period of [fol. 602] time designated as the period not exceeding 48 hours. As a result of observing it in a general way, without a particular investigation I should estimate that it would run around from 40 to 60 per cent.

I do not know whether the Pennsylvania Warehousing & Safe Deposit Company renders any different service or services than the complainants in these cases. I believe we render about the same service as the complainants in this case, as indicated in the testimony of the complainant's witnesses in Washington.

Our company does not prorate the freight charges among a number of the owners of the goods. Our company does collect for the goods on deliveries made by customers—deliveries made for the customers of the warehouse, and remit to the shipper.

Cross-examination.

By Mr. Hickey:

This John Smith I referred to, may have an office in Chicago and not in Philadelphia. He might have an office in St. Louis or Kansas City, and in that event, when we collect the freight, to get the freight out of John Smith in Chicago, St. Louis, Kansas City or some other outside city, we would send the freight bill to him with the rubber stamp notation on it, "Please draw checks to the Pennsylvania Warehousing & Safe Deposit Company." This freight that we receive payments from the Baltimore & Ohio for, is all carload freight, transported at carload rates and the payments from the Reading Company is on carload freight transported at carload rates.

Q. Now I understood you to testify that you never make collections from more than one person. Are you speaking of your business activities in the month of June, 1928?

[fol. 603] A. Yes sir.

Q. Do you say that you would not do so if one of your customers asked you to?

A. Yes, sir.

Q. You would refuse to do it?

A. Refuse to split the freight.

Q. Refuse to—I am speaking now of freight charges, you would refuse to collect those freight charges?

A. Yes sir.

The Pennsylvania Warehousing & Safe Deposit Company has shipped small lots of freight out by express, American Railway Express, for the owners. We prepay the freight charges on such shipments.

We have shipped small lots of freight, outbound, over one or another of the three railroad systems serving Philadelphia for our customers. We have prepaid the freight charges on those shipments on instructions of the owners, acting as agents of the owners of the merchandise.

In conducting our warehouse business, we would prepay the freight charges for the account of the customer if they requested us to.

By Mr. Hickey:

Q. If any of your customers requested that you collect a certain amount of the transportation charges, on a certain lot of freight, delivered to a certain person in the city of Philadelphia, would you do so?

The Witness: If the meaning is that we would deliver a part of a car and collect the freight on a part of the car, we would not.

By Mr. Hickey:

Q. Now Mr. Justice, in describing the services that your company performs for those two railroad companies, I [fol. 604] did not understand you to describe the services when your company trucks that freight from certain delivery tracks.

Let us take the Baltimore & Ohio first: Does your company truck any of this inbound freight from the belt line—Baltimore & Ohio freight?

A. The freight, as explained before, for the Pennsylvania Stores and the Pennsylvania Tobacco Stores, is trucked from the Delaware Avenue sidings across the street.

Q. I am speaking of Baltimore & Ohio inbound freight. Have you told me all of the trucking services your company performs on the Baltimore & Ohio inbound freight for your warehouses?

A. Goods for the Atlantic Stores and West India Stores is trucked from Morro Phillips Stores—that is all that I know.

Examiner Brown: This map will be received and marked exhibit No. 93.

Redirect examination.

By Mr. Barnes:

Q. Mr. Justice, I show you the form of arrival notice, and the second form of arrival notice, and ask if those are the forms which are used by your company, the first in the case of one that does not require much space, and the second, where greater space is required for description of the goods?

A. That is right.

Examiner Brown: These forms will be received as exhibits 94 and 95.

The Witness: This arrival notice, either the short form, or the longer form, is sent to the consignee of the shipment, or in case of order-notify, it is sent to the notify party. [fol. 605] It is done on the date of the arrival of the car.

Edward W. Oescher was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Barnes:

My name is Edward W. Oescher. I have been employed by the Pennsylvania Warehousing & Safe Deposit Company over 18 years. My present position with the company is secretary and treasurer. I have brought a list of the stockholders of the company as of the present time.

Neither the Baltimore & Ohio Railroad Company nor the Reading Company nor any other carrier has any stockhold-

ings in the Pennsylvania Warehousing & Safe Deposit Company—not one single share. The stock control of the company I would say rests in what is now the estate of George H. Earle, Jr., Mr. G. W. Cook and three or four others, which are commonly known as the Earle group. Mr. George H. Earle, Jr., is a former vice president of the company, recently deceased in the present year, and Mr. Cook was his associate.

The Earle group owned stock in the Finance Company of Pennsylvania, which has a very large block of the stock, and other financial institutions in the so-called Earle group—I would say control the stock.

I have charge of the accounts of the Pennsylvania Warehousing & Safe Deposit Company. I am familiar with the contracts our company has with the Baltimore & Ohio Railroad Company and the Reading Company. I know of not one single instance while I have had charge of the accounts, which is over a period of nine years, where our company [fol. 606] has received any payment upon any freight in which it has any ownership interest whatsoever, from either one of these railroad companies. Our company receives coal shipments for its own use, on which no payment is made.

Hubert J. Horan was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Glasgow:

Mr. Glasgow: I want to say, Mr. Examiner, that this evidence that I am now offering, is offered on behalf of the Commercial Exchange of Philadelphia, and the other trade bodies who have intervened.

The Witness: I am president of the Commercial Exchange of Philadelphia. My business is flour. I have been engaged in that business over 40 years.

As to the present and largely as to the past, before the warehouses were established, I am familiar with the practices and methods of handling and delivering freight by the carriers in the city of Philadelphia.

Q. When, Mr. Horan, for the first time, did the Pennsylvania Railroad Company begin the practice of handling carload traffic package freight through warehouses, in accordance with the practice now in effect in the city of Philadelphia?

A. Well, would it be in order to state the conditions that existed before the warehouses——

Q. I was just going to get that date, and then I was going to ask.

A. That I think was in 1887.

Q. Now prior to that time, in 1887, what was the method [fol. 607] of handling and delivering carload package freight throughout Philadelphia?

A. Up to about 1883, warehouses—private warehouses were on Market Street, with railroad connection. The railroad tracks at that time—freight tracks ran down the center of Market Street, and each warehouse had a switch, and the flour was delivered into the private warehouse. Previous to that they were also on Broad Street. These tracks at one time extended as far as Eighth and Market, warehouses lined solidly on both sides of the street. Broad Street north particularly was all flour warehouses, and they had previous—sometime before that their tracks were taken up, but they had railroad connection when they were built.

The warehouses to which delivery was made, were owned, or leased, or in some way controlled by the parties who were engaged in the flour business and in other businesses in Philadelphia and the method of delivery was for the railway company to switch the car into the warehouse.

Q. Now when, Mr. Horan, did you say that the Pennsylvania Railroad Company began the present practice, in 1887, did it establish then a warehouse of its own where it made delivery to parties to whom the freight was consigned?

A. After the tracks were taken up off Market Street and the elevated railroad was built in, the railroad then established a freight station at 17th and Market. First they had it at 16th, then they put it at 17th. At that time, we hauled the flour from this freight station at 17th and Market, into our warehouse.

The first warehouse was established by the Pennsylvania [fol. 608] Railroad in 1886.

The Pennsylvania Railroad Company built a warehouse at 18th and Market Street, known as the flour warehouse.

At the time they built it, they made a proposition to all of the flour people engaged in the flour business. I was directly interested in it, and they gave us the privilege of subscribing for a portion of the stock of the Merchants Warehouse, they controlling the majority, in order to get us to have our deliveries made through the Merchants Warehouse. At the same time they gave us a special rate, a free storage rate of 10 days. Then they charged us one cent a barrel for each succeeding 10 days. That warehouse was established at 18th and Market. I knew all the circumstances in connection with it, and that was the terms.

Q. Now then, when the flour arrived at their warehouse, who unloaded it?

A. They established the Merchants Warehouse to manage the warehouse company, and made it—it was a corporation, and as I say, the people in the flour business had the privilege if they wanted of subscribing to the stock.

Q. Now the Merchants Warehouse Company that is a party to this proceeding, is that the same Merchants Warehouse Company that was engaged at that time?

A. Yes sir. The explanation that the railroad company—they came down—the officials came down to the Commercial Exchange, and the explanation they gave was this, that the time that they lost in having cars tied up, made it profitable to do that, to make a cheap rate of storage there, and they bought the property and built it. They owned [fol. 609] the ground and built the warehouse.

Q. And the purpose that I gather from you of the Pennsylvania Railroad Company in establishing this warehouse, through the Merchants Warehouse Company, and providing for the storage that you have spoken of upon flour delivered, was to secure a more expeditious release of their equipment?

A. It was for two purposes, first, to secure the expeditious delivery, and reduce the burden of freight that was coming into their station at that time at 17th and Market. The flour business was too big, really, to be handled through that station that they had there.

Q. Was it also the purpose to secure the expeditious release of their cars?

A. They had two things, the track delivery—there was not exactly a specific period—you could truck along for a certain length of time on track delivery, and it was also at

17th and Market, and therefore, this was the first time, I might say, that they limited us to what they called the free storage period, and then they gave us 10 days to take it out in free storage. At the present the time of free storage has been reduced to 48 hours.

The traffic is now handled in the warehouse in exactly the same system that it was handled when this warehouse was first established, except the reduction of the free storage period.

Q. Now, Mr. Horan, has there been any expansion throughout Philadelphia, from that time, of points established by the Pennsylvania Railroad Company, at which it would make these deliveries?

A. Well, at that time, every flour man had his own ware- [fol. 610] house. When the warehouse company gave us this low rate, which meant that we could leave the flour there for 40 days for three cents, and it cost us four cents to haul it in, it became an uneconomical proposition to keep your own warehouse, and gradually each flour man gave up his warehouse.

Then the warehouse became—could not handle that single warehouse—could not handle that business, and then they started to build warehouses in different sections of the city, which also I might say, the flour trade themselves took this proposition up on the ground of economy in hauling—that a man in another section did not want to have to come to 18th and Market, or to 15th and Carpenter, a man in the southern section didn't want to go away up town, and as a result of many conversations and talks with the railroad, and everything, and the warehouse company in particular, the system was established, that when they built a warehouse, to put it in some location that hadn't at that time the proper service, and the result is that every part of Philadelphia is now covered in such a way that you get the greatest economy of handling. If a man in Richmond or away uptown had to haul his flour from 15th and Carpenter, the cost of that would be 15 or 20 cents, and he would probably handle it out of that warehouse for about six to eight in the immediate neighborhood. This here thing has been worked out on the basis of the economic method of handling flour, and I might say the profits in the flour business are at the minimum and always have been.

Q. Were these different points, following the location of the warehous- at 18th and Market—were these different points where warehouses were established by the Merchants Warehouse, established at the direction of the [fol. 611] Pennsylvania Railroad Company as points where it would make delivery of freight?

A. That was our understanding of the conversation with the officials of the railroad.

Mr. Hickey: Objected to.

Examiner Brown: The witness may answer if he knows.

Mr. Hickey: I move to strike out the answer on the ground that it is an unfounded conclusion.

Examiner Brown: The evidence will stand, subject to Mr. Hickey's objection.

By Mr. Glasgow:

Q. What has become, Mr. Horan, of the warehouses operated or owned by the individual business men which existed prior to 1887?

A. Well, as far as the flour business is concerned, with the single exception of one, I do not believe today that there is a private flour warehouse in Philadelphia, except that one.

Q. Is that largely true of other lines of business than flour?

A. That I could not answer.

I do not see how it would be possible for a flour man today to go back to the old method of handling flour, which was in effect prior to 1887. When you take into consideration the tremendous growth of Philadelphia since, and that we have to make deliveries to almost every part of Philadelphia—now for West Philadelphia as an illustration, we use 31st and Chestnut; for Kensington we use the warehouse up there; downtown we use 15th and Carpenter, Front and Federal, or Central we would use Front and Chestnut. To get warehouses we couldn't get railroad connections today, [fol. 612] I don't believe, and to make an economical delivery for the benefit of the people—the consumer, it would be an impossibility, and the cost would grow to such tremendous figures that I don't know, we would all have to

localize our business. In other words, we could not make distribution really economically over the city of Philadelphia today.

The handling of flour is a highly competitive business in Philadelphia. The competition comes, of course, between merchants engaged in the business in Philadelphia, and mills who have their own offices here—large mills who have their own offices and have their own employes, selling to the same trade that we do. I would say that the average profit on flour is about 15 cents a barrel, in handling it in wholesale lots.

In my judgment, as far as the business interests in flour are concerned in Philadelphia, and those who are engaged in that business, if an additional burden was put on them in the expense of unloading and delivering the freight, the result would be that it would put an additional burden on the articles, of 50 cents a ton, or practically, on flour, of five cents a barrel, and the problem then would arise as to our ability to transfer that burden to the consumer, and we would be in a position where it would be really a question of whether we could do it.

In the state of competition in Philadelphia, it is my opinion that in a large number of cases it could not be done. It would simply be cutting our profits from 15 to 10 or from 10 to five. That would not justify continuing in the business.

The margin has grown so small in the business that the number of men are constantly lessening—the number of people that are in it.

[fol. 613] Of course, we have got the competition of the big mills who have their own agents here, and handle it, and they can absorb a percentage of that loss in their own business—it might be, but the general trade could not.

My testimony that I have given here so far as to the Merchants Warehouse Company and the Pennsylvania Railroad Company on deliveries, is equally applicable to the Baltimore & Ohio and the Reading and the Pennsylvania Warehousing & Safe Deposit Company, to this extent, that I testified that I knew all about the organization of the Merchants Warehouse Company, and I testified that positively, because I was actually in contact with the officials and heard their explanation of why it was being done.

Now, outside of the fact that the Pennsylvania Warehousing business, as far as we are concerned, is business exactly the same as the Merchants, I know nothing about how they are organized or anything else.

The effect as far as the deliveries made by the Baltimore & Ohio and the Reading Company upon the business interests of Philadelphia would be the same if it was withdrawn by the Reading and the Baltimore & Ohio, because of the fact that the distribution of the warehouses—the Pennsylvania Warehouse Company in Philadelphia are working in harmony as a matter of fact on trade principles with the Merchants, so that when we want to make certain deliveries, we ship it via the Pennsylvania Railroad to get the Pennsylvania Warehouse delivery. That is from an economical idea, economy in getting—economy in handling flour in Philadelphia.

I heard the testimony of Mr. Anderson at Washington, [fol. 614] who represented the Millers Association. Mr. Anderson, as president of the Millers International Association, testified that the millers objected to the present system of handling flour in Philadelphia; that he thought it should not be allowed into the warehouse until the bill of lading had been surrendered, the presumption being that the man could not get the bill of lading without first paying the draft. Of course, the man might mail the bill of lading to him—that often happens.

Now in the first place, the question of whether it will go on track, or whether it will go in a warehouse, depends entirely upon the shipper. When the shipper makes out a bill of lading and directs that the flour shall be delivered to the Merchants Warehouse at 15th and Callow Hill, or the Pennsylvania Warehouse at 15th and Carpenter, or the other one, then I contend that the railroad must deliver to that warehouse before a complete delivery is made. It must be put in there.

Now Mr. Anderson—the mills that he represents, have in their own hands a remedy, and that is, to consign it to Philadelphia track delivery, and then it cannot be put in a warehouse until the bill of lading is surrendered, but in order to do that, once it arrives there, as I understand it, to afterwards put in into the warehouse it would cost $6.30, and I do not believe that the railroad would pay the unload-

ing charge. So I conceive that Mr. Anderson misunderstood and did not know how things were conducted in Philadelphia.

He also testified that there was no other place that did business that way. Now, the only place that I am intimately acquainted with is New York. The flour is shipped in there, stored in the railroad place and held subject to the delivery of the bill of lading. That may be delivered [fol. 615] whenever the man pleases to do it. If he wants to avoid the storage of the flour in the warehouse, prior to the payment of the draft and the production of the bill of lading by the consignee, all he has got to do is to consign it to tract delivery in Philadelphia.

Examiner Brown: Would track delivery in Philadelphia be satisfactory to the interests you represent?

The Witness: It would not suit me, but he wants to put the whole of us in a class with about five per cent at the outside. What I am objecting to, he wants to demoralize our business.

The percentage of the traffic in flour coming into Philadelphia, in my judgment, from my experience and knowledge, to which the objections which Mr. Anderson urged, and to which I have referred, would apply, would not amount to five per cent under the most extreme circumstances. What he is objecting to is the men putting the flour in a warehouse and leaving it lay there without paying for it. Now if they made a contract with the mill that they will pay for that flour on arrival, the day it arrives their notice is sent them, and they have got at the outside 48 hours to complete their contract, and if they don't complete it, that is a matter of credit between the mill and the customer.

I am talking in a broad sense. If the consignee don't pay the draft, it is consigned to the order of the mill, notify John Jones. Mr. Jones has the draft—I am taking the general way of doing business. A draft is sent to the bank for Mr. Jones to pay, and on that is a notice, hold for arrival. Now his contract calls that he shall pay for that flour on arrival. Now the most he has got is 48 hours, which gives him an opportunity to have that flour inspected [fol. 616] and see that it is up to grade, provided the bill of lading permits him to do it. Now some mills, there is a provision that they won't allow it. In that event he could

not inspect, but all of my bills of lading have the provision that inspection is permitted, otherwise it could not be inspected, but in that 48 hours he has ample time to inspect and find out whether the flour is according to contract, and then it is up to him to pay it if he is going to stick to his contract.

The members of the Commercial Exchange, represented by the Flour Committee of the Commercial Exchange, and the members themselves have had this problem up for a number of years. As men who are trading here, it came to a question of them getting together here, or else upon the question of credits and how the business was being done, and everything, and we took this up, and it was a very, very serious thing, five or six years ago, and we took it up with the mills, and we wrote the mills, and we called their attention to it. We offered to send them a list of the people in Philadelphia that could be trusted, and I wrote personally to the president of the International Association, and he answered back by saying if he tried to instruct the millers on the question of credit, they would tell him to mind his own business. There is not a miller shipping that don't know certain people will take up their drafts, and other people will not—will hang on for a while. I am positive of another thing, that the amount of it has gone down to almost an infinitesimal amount today. That has largely been dependent upon the selection of people as customers who would pay their drafts promptly. That is the only solution, and we have cheerfully and willingly told the millers that we will help in any way to remedy this con-
[fol. 617] dition, and I want to say it was a thunder-clap to us when we heard Mr. Anderson's testimony.

Cross-examination.

By Mr. Hickey:

I could not name those millers who will ship that five per cent. I could take the membership of the International Federation and pick out some of them, but unless I had the list before me, I question whether I could or not.

I spoke about the competition of one mill which has its own warehouses in Philadelphia—the name of that mill I think is Pilsbury. There are quite a number of bakeries in Philadelphia. There are two who get their shipments

of flour in carloads, set on their own sidetracks. One is the Freihofer and the other is the American Stores.

I should say that the Pilsbury Mill does not get this allowance for unloading flour at its warehouse. I don't know, though, but I don't think they do, because that is a private warehouse, and I would not think they would be entitled to it.

Mr. Hickey: If the Examiner please, I move to strike out the testimony of the witness concerning the handling of flour at New York, unless and until my opponent, Mr. Glasgow, submits the published tariff provisions governing that handling.

Examiner Brown: The testimony objected to will be considered in connection with your objection and will stand as submitted.

By Mr. Campbell:

I am in the flour business. The name of my company is Hubert J. Horan. My son is a partner, but we trade under the name of Hubert J. Horan. I am a wholesaler, and a miller's agent, I would say. In other words, I represent certain mills as their agent, and I buy flour and sell it. Wholesaler I would say was a man that bought by the car-[fol. 618] load and largely sold by the carload. That is my business. The other is distributing flour as a miller's agent.

(Witness excused.)

Examiner Brown: Mr. Hickey, did I understand you correctly, in answer to a statement made by counsel for the Pennsylvania, that your clients would not be satisfied to receive the same contracts from the Pennsylvania and the other defendants, as are at present maintained with the intervening defendants?

Mr. Hickey: If you will separate that from the contracts, my clients would be delighted to receive the equivalent allowance from these railroad companies—that is, allowance of the same kind and character and measure, as is granted by these three defendant carriers to the subsidized warehouse companies. However, their counsel believes that they are not entitled to it any more than the subsidized warehouse companies are. Now that is the status. If you

wish, I can inform you definitely what I think these allowances are.

JAMES J. REILLEY was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Glasgow:

I live at 4625 North Broad Street, Philadelphia. My business is merchandise food broker and manufacturer's agent. I am a member of the Grocers and Importers Exchange of Philadelphia, which is an intervener in this case. I am speaking for that association and its members with regard to the question of change in the present method of handling carload shipments of food products in Philadelphia. They are opposed to any change in the present arrangement. The members of The Grocers and Importers [fol. 619] Exchange of Philadelphia are engaged in the wholesale grocery business. They handle a full line of grocery products and manufactured products that are disposed of through the retail grocer channels, canned goods, dried fruits, beans, cereals, flour, soaps and allied lines of that character.

Occupying the position that I do, a member of the Grocers and Importers Exchange, and also the Association of Manufacturers Representatives, I am engaged in the brokerage business, and my duty is to instruct the shippers how they are to ship the merchandise, unless I am advised by the purchasers how they want it shipped, and then I follow their instructions.

In ordering out the car or cars, I instruct the consignor, the shipper, to route his car Pennsylvania Railroad, as an illustration, Merchants Warehouse, River Front Stores, to me care of the Merchants Warehouse Company. The freight charges follow.

It is very unusual times when the freight is paid in advance on the shipment.

The usual method that I pursue, and is followed by I believe most every one, when a car starts from its originating point, destined to a specific warehouse, we advise the warehouse company that the car is rolling. When the car ar-

rives the warehouse company notifies us that the car has arrived, giving a note of the contents, and if there is any breakage in the car, or damage, and notation is made on that arrival notice, and the arrival notice specifies what is the content of the car, or in other words, if there are a varied number of lots in the car, they are specified on the notice of arrival.

[fol. 620] Very frequently the warehouse company calls us on the phone and tells us the car has arrived. The written notice to which I have heretofore referred, follows after the car has been opened and inspected. Very frequently the same day the car arrives. Very frequently I or the members of my Exchange have already sold the contents of that car. As soon at the notice arrives, we issue a written order from our office to the respective buyers that are in that car, noting on the order the specified articles that have been sold to them. Those orders we frequently deliver by a messenger from my office to the respective buyers, or it is sent to them through the U. S. Mail.

The order is made out to the respective buyers in this fashion, Merchants Warehouse Company, as an illustration, River Front Stores: Please deliver to John Doe & Company the following commodities. After those orders are presented by the parties to whom we have sold the freight or the commodity to, the warehouse company delivers the specified amount of the commodity to that person.

I spoke of the notice we got from the warehouse company, specifying the contents of the car and the condition of the contents of the car. The notice from the warehouse company attached to exhibit 91 is a type of notice we receive.

We, or the persons to whom we have sold the contents of the car, have 48 hours to take it from the warehouse company, before storage begins. If within 48 hours the contents of that car sold by us have not been demanded from the warehouse company, but is left there on the orders which we have issued, it goes on storage in the warehouse for account of the buyer, to whom I have issued the order, [fol. 621] and then goes in accordance with the warehouse tariff rate for storage. As far as the question of withdrawing the loading and unloading by the agent of the railroad, of this traffic—so far as people who are engaged

in the same line of business that I am in Philadelphia—the delivery I presume would have to be made from the track somewhere, team track. I presume it could be arranged to deliver it at the warehouse in case the consignee or his customers paid the unloading. I would either be obliged to pay the loading and unloading—unloading charges on it—or charge the respective buyers. Some one would have to pay it.

We could not possibly make an inspection of the contents of the car on the track. The car rolls in, and in most cases they have four or five different brands—four or five different grades and sizes—be impossible to get in the car and get at those respective packages in there and inspect inside of the car. It could not possibly be arranged to make the delivery to the persons to whom we have sold, unless the contents of the car, both the markings on the packages and the persons to whom they are going, are separated into lots.

There are some people that are engaged in the business that I refer to, or who are receiving food products, who are very large dealers in Philadelphia. The small dealers are by far in the majority.

Q. What would be the effect, in your judgment, and from your experience and knowledge, if this service which is now rendered by the railway company, were withdrawn, so far as the smaller dealers in Philadelphia are concerned?

A. I can answer that question in this way: The structure of the food business in the past 15 or 20 years has changed [fol. 622] entirely. I can illustrate that by the fact that the large jobbers are by far in the minority; the smaller jobbers, of course, in the majority. The merchandise is very highly competitive, the smaller jobbers competing with the larger distributors must necessarily sell at a very close margin. If they were to be obliged to add to their already—if they were to be obliged to add to their cost of the products they purchase, they would naturally not be in a competitive position with the larger jobbers, who may have their own sidings into their warehouses, as ultimately, as has been shown in the past 15 to 20 years, some 15 or 18 jobbers have been obliged to go out of business by the highly competitive situation that has been presented in the past 15 or 20 years.

If the cost of unloading, insuring, and so forth, of the carload package freight, were transferred from the railroad company, as it is handled at present, and put upon the consignees of the traffic, they could not stand the traffic at all. They could not stand any added cost to the cost that they pay for factory prices.

The freight rate which we pay involves the service of unloading and insuring and storing for 48 hours. That is the only charge we pay and we pay that when we pay it in the freight rate.

The present method and the distribution of the warehouse at points for delivery all over the city, has been in my experience a decidedly convenient and economical way of handling the traffic for the business interests of Philadelphia as now constituted.

I am not only a member of the Grocers and Importers Exchange of Philadelphia, but the Association of Manu- [fol. 623]. facturers Representatives and I am authorized to express here the views of the members of this association as to any change in the present method of handling the business.

By Examiner Brown:

Q. Mr. Reilley, in that connection, is it the view of the interests that you represent, that it would not be in their interest to have the same treatment extended to the complainants in this case, as is now extended the intervening defendants?

A. Our interests, Mr. Examiner, rest with one point, and that is we have no desire to have the present arrangements changed.

If the so-called allowance were extended to include the complainants there could be no objection to that from our interests.

By Mr. Bikle:

Q. Would that do you any good, unless those intervening defendants assumed the cost of unloading at their warehouses?

A. That would be very necessary.

Q. It would not do you any good if the railroads just gave them an allowance and they did not take those goods out of the car? The point you mean is that you would have no objection to the other warehouses getting the allowance, if they then assumed the burden of unloading the freight into their warehouses and relieved you of that and took care of it during the free time?

A. That is the manner in which I thought the question was put.

By Examiner Brown:

Q. In other words, assuming that they perform the same service as the intervening defendants, that is what you mean?

Mr. Bikle: For the railroads. Would it do you any good if they got the allowance and did not assume any of that duty?

The Witness: It would do us no good if they did not [fol. 624] absorb that.

Examiner Brown: The interests you represent would not object then to having the carrier defendants make allowances to these complainants, similar to those now enjoyed by the intervening defendants, provided that the services performed by the complainants would in all respects be identical to the services now rendered you by the Merchants Warehouse and the other intervening defendants?

The Witness: There would be no objection to that.

Mr. Bikle: When you say that they would be identical, you mean that they would render that at the expense of the railroad and not at your expense?

The Witness: Doesn't matter much to us whose expense, as long as it is not ours.

By Mr. Bikle:

Q. Do you know of any other interests in the situation to which the warehouse could look for that, except to the railroads or yourself?

A. That is about the only direction they could look for it.

If the Commission interfered with this arrangement by putting in a cease and desist order on the ground of discrimination, leaving it to the railway companies to cure the

situation, in Philadelphia by withdrawing the whole plan, then I would certainly protest on behalf of my associations, vigorously, to any such withdrawal of the service.

When it comes to the question of whether in addition to the service that we have now from the warehouses who are here as interveners, whether there shall be other warehouses performing the same service, to be paid for by the carriers, we have no interest in that question at all. But I do protest against any condition under which the arrangement under which the traffic has been handled for [fol. 625] years, being impaired or nullified. My evidence was directed to what would be the result to the business interests of Philadelphia if any such catastrophe should happen.

JAMES J. ROGERS was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Glasgow:

I live in Philadelphia. I am a member of the Commercial Exchange and the Bourse, both of them interveners in this matter. I am a representative of western mills, selling flour to jobbers and carload bakers in Philadelphia. I am familiar with the way the carload package freight, so far as flour is concerned, is handled in Philadelphia, both by the Reading, Baltimore & Ohio, and through its warehouses or the warehouses that it has contracts with, and by the Pennsylvania, through the warehouses that it has contracts with.

The trade in Philadelphia approve very much the present system. They order their flour into Philadelphia from different warehouses, and by unloading the cars it gives them a chance to have them inspected, see what damage is done. They receive their notices from the warehouse company, and in that way know just what they are getting, and call and pay their drafts and take delivery of their flour.

If the shippers of that flour—millers—were careful as to the customers to whom they sell, as to their credit, and the promptness with which they pay their bills, there is no

disadvantage, so far as I can see, to the millers or shippers in this arrangement, because it is up to the broker here to know who he is selling, and if he is working for [fol. 626] the mill's interests, he will see that he sells to people that take care of their obligations when a car arrives.

We sell the jobbers, who in turn sell to the small bakers and they also sell to the smaller carload baker, who buys in carload lots and brings it into the warehouse and stores it there and takes it out at any time.

Taking the smaller jobbers to whom we sell, competition is very keen between them. As a matter of fact, it is well known that the big baking concerns in Philadelphia are always able to buy their flour to better advantage than a smaller jobber or carload baker, for the simple reason the mills take the position they take these big orders as running time, and they figure on selling the smaller carload baker on a little better basis, where they make their profit. The jobber brings his flour into Philadelphia, he has to pay eight cents a barrel storage, 12 to 15 cents a barrel for delivering the flour to small bakers, and then add a nominal profit, credit of 30 to 60 days, which makes the price to the small baker a lot higher than the big baker. If any additional cost is put on to the small buyer, they might as well quit business, because there isn't a chance to exist.

If the arrangement as to the handling of freight, loading and unloading, and insurance, and 48 hours storage, and so forth, were cancelled or removed in Philadelphia, there would not be any small jobbers and small bakeries inside of five years, because they couldn't exist. They are just about making ends meet now. I am in position to know, because I get people in the jobbing business very close to me. I am agent for certain mills, namely, Minneapolis Milling Com- [fol. 627] pany, Minneapolis, Minn.; Texas Flour Mills, Galveston, and Excelsior Flour Mills, at Kansas City, Mo. I have been in business here 15 years.

Cross-examination.

By Mr. Hickey:

I do not know if those small jobbers and dealers are in business at Toledo, O., or at Detroit, Mich., or at Pitts-

burgh. I do not know of any market, only Philadelphia. I am located here and do my business here.

STEWART UNKLES was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Glasgow:

I live in Philadelphia and have lived there about 22 years. I am in the flour business there. I am manager of one mill, manager-branch manager. The mill is Hecker-Jones-Jewell Milling Company. It is a large concern with headquarters in Buffalo, N. Y.

I was present when Mr. Anderson, representing the Association of Millers, testified in Washington.

Well, his testimony, I understood, was to the effect that the present arrangement under which carload package traffic was handled through certain warehouses in Philadelphia, for delivery for the several railroads, ought to be cancelled, because the drafts which were sent here by the shipper or consignor for the purchase price of the flour were not paid, when the flour went into the warehouse on storage, and that the shipper or consignor was delayed in receiving payment, indefinitely, by reason of the arrangement of storage with the warehouse companies under their con-[fol. 628] tracts with the railway companies.

Q. Will you please state whether there has been in the past any trouble of that kind in the business in Philadelphia?

Examiner Brown: Speak for your own concern, first.

We have not had trouble of that kind with our own concern in Philadelphia for the last four or five years. We did have trouble following the war,—a year or two after the war. At that time all the markets were declining very rapidly. The markets were in confusion. I think that has cleared up since that time.

Q. To what extent would you say, as far as your company is concerned, has any such trouble existed in Philadelphia within the last year, or at the present time?

A. My own experience is that I don't suppose there is one per cent of the entire flour jobbers in Philadelphia today [fol. 629] that practically renegs on their draft—that pays them fairly promptly. Any difficulty of that kind can be to a large extent overcome, by the exercise of care on the part of the miller or consignor in the selection of his customer. It is the fault of the seller in selling irresponsible dealers in Philadelphia, or anywhere else, that the drafts in most cases are laid here, and not paid.

I am familiar with the conditions throughout the trade in Philadelphia. My testimony would refer to the entire business here in Philadelphia, the selling of flour this past four or five years.

It is my business to keep myself informed as to the credit of customers and the paying of their drafts throughout the city and throughout the trade and I do that. I come in contact with other agents who are engaged in like business with me. Sometimes I hear what they have to say as to that kind of business; sometimes I don't

When we find a buyer of that kind that does not pay his draft, it becomes quite common knowledge amongst the trade, and it goes from one mill manager to another, until he practically is known as a "draft dodger."

Q. Now would you say that the testimony you have given as to your own experience with your own business, with regard to the difficulty with people not paying their drafts, was the usual experience in the business throughout the city?

The Witness: Why, I do not know what the other fellow's business is, as far as some of them are concerned, but I think it has been minimized a great deal throughout the trade this past four or five years. It is minimized simply because some of these men went out of business, and then again some of them became so bad and so rotten, that even [fol. 630] the mills refused to sell them.

(Witness excused.)

Examiner Brown: Do you have an exhibit, Mr. Woodcock?

Mr. Woodcock: Yes sir.

Examiner Brown: Without objection, this will be received as defendants' exhibit No. 96.

Mr. Woodcock: Mr. Hickey, will you be willing to stipulate that Mr. Gheen, if called, would introduce testimony with respect to this exhibit which would be similar in substance to the testimony which Mr. Funck introduced in connection with defendants' exhibit 80?

Mr. Hickey: Yes.

Stacey F. Kensil, Jr., was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination:

I represent in this proceeding the Philadelphia Warehousing & Cold Storage Company. The stock of that company is distributed among different individuals. I think the largest stockholder is a party who holds 605 shares. It goes from that down, in different amounts, down to two, three and one shares. There is no stock held by any carrier or any carrier's agent.

There is no majority stockholder in any individual or group of individuals. The capital stock is $800,000. We own our own building. We have three warehouses, in one group, at Delaware Avenue and Noble Street. We own all of those three.

Examiner Brown: Any other testimony in behalf of defendants or interveners in behalf of defendants?

(No response.)

Examiner Brown: We are ready to hear you in rebuttal, Mr. Hickey.

[fol. 631] Rebuttal

Mr. Hickey: I will call Mr. Gallagher.

James Gallagher was thereupon recalled as a witness and, being previously sworn, further testified as follows:

Direct examination.

By Mr. Hickey:

I operate a general trucking service in the city of Philadelphia under the name James Gallagher, Inc. The general

office of that company is located at 50 South 3rd. That trucking service has been in operation for about 70 years. I have operated it about 45 years myself. In conducting our trucking service, I become informed of the location of the various public railroad freight stations in Philadelphia where inbound freight is customarily received for delivery, and where outbound freight is customarily tendered to the railroad companies for transportation. It has never come to my attention that the warehouses of the Merchants Warehouse Company were such public freight stations.

Being a public truckman, we frequent all the stations at Philadelphia, and distribute freight to all of those stations, and haul freight from the Merchants Warehouse and haul freight from the Pennsylvania Warehouse, and all other warehouses. I know that the Merchants Warehouses do not receive freight for shipment; I know that they are hauled to the Pennsylvania Railroad and not to the warehouse to receive outbound freight—that is, for shipments.

Our company has trucked freight to and from warehouses of the Pennsylvania Warehousing & Safe Deposit Company. Only a few days ago I got a couple of cases.

My experience during several years has been that the [fol. 632] Pennsylvania Warehouse always delivers freight out of lots.

For instance, Mauria Muria is one of the largest jobbers, and they want goods at 23rd and Callow Hill, or 16th and Callow Hill, and we haul from there. In other words, we haul them for a China house, and we take that notice and go to 16th and Callow Hill and get those cases, possibly two, three or four in lots, and I know that once upon a time as a warehouseman we had Mauria Muria's account, and we used to distribute them the same way, and we had also several other accounts—a refrigerator account—that likewise did the same thing with the Pennsylvania warehouse, and they are doing the same thing today. They are distributing them in one and two—they come in carloads.

Cross-examination.

By Mr. Glasgow:

The Merchants Warehouse Company never receive freight for shipment outside of Philadelphia. I mean that they would gather up in the stores of the city and take there

for delivery. No freight came to and was received at the Merchants Warehouse Company to put into cars, to be shipped out of the city of Philadelphia.

I called at the Pennsylvania Railroad station this morning, and I took Walnut street wharf—I took it up with some people there, that they asked me—they didn't care to get into this thing up here—who are very, very good friends of mine, and they know what they are talking about. I acquired that knowledge through Mr. William Hammersley, the agent of the Pennsylvania Railroad at Walnut street wharf. He said if any such shipments had come through the Merchants Warehouse, that they would come to his notice. He said such has never been the case—that there never have been any shipments. And I also saw Mr. Lind- [fol. 633] say, and asked him the same question, and he said precisely. Then I said to him that I was going to use that testimony today against Hammersley and Lindsay. They said they were sorry they spoke. I know what a bill of lading is.

Q. Look at that. Will you——

The Witness: This is a bill of lading, yes. That reads Curtis Publishing Company, shipping a carload of stuff to be shipped to Westchester, Mass. Curtis Publishing Company is one of the biggest shippers in the country today.

The information I have on the question of whether the Merchants Warehouse Company receives freight, puts it in cars for the railway company, which freight is shipped outside of Philadelphia, is not only the information I have from those men, Hammersley and Lindsay—we have heard further about that. We asked the warehouse there sometime ago. They said, no, they didn't receive any freight.

Q. Whom did you ask?

A. We asked the man on the platform.

Q. Who were they?

A. Foreman.

Q. Who is he?

A. Pat Toohey.

Q. What did you ask him for?

A. We did in this respect: We had a part carload in there, and we wanted to know if we could bring in the other part of the carload in there and ship it there, that the parties requested that; he said no.

Q. How did it get in there?

[fol. 634] A. As a warehouse proposition, to put in a car to go to some other place.

By Mr. Glasgow:

Q. What warehouse was it that you asked the man on the platform?

A. Merchants Warehouse, River Front Stores.

Q. And your reason, you say, for asking him, was that you did have a carload in the warehouse?

A. Requested by the shipper.

Q. And that you wanted to put more in there so as to make up a carload?

A. Yes, there was about three quarters of a car there, and we wanted to put about a quarter more of a car into it to complete a shipment and send it out.

Q. When was this?

A. This happened at various times. Maybe somebody would request our office—our office would telephone down.

Q. Tell us when you had three quarters of a car in there and wanted to fill it up?

A. Two or three years ago.

Q. Hasn't it been more than two years?

A. I said two or three years ago.

Q. You cannot give me the date?

A. No, unless I go back to the records.

Q. Now Mr. Gallagher, I want to be perfectly fair with you, and I do not desire to get into any question with you, [fol. 635] and I am giving you the opportunity, where you have stated so positively that the Merchants Warehouse Company did not receive freight and ship it out, when we can produce the bills of lading that show it, that I want to ask you to again consider the broad way in which you have stated that matter.

A. That bill of lading that you have may have been stuff shipped out of a warehouse—no indication to show the teamsters hauled that.

Q. I understand that, but I expect to follow it by the evidence of a man who received it, as to what was done, and I ask you again, do you mean to state in this record——

A. I s-and on the record.

I am the complainant in one of these actions.

By Mr. Bikle:

One of the gentlemen that I said gave me some information was Mr. William Hammersley. He is the agent down at Walnut street wharf and Mr. Lindsay is chief clerk.

Redirect examination.

By Mr. Hickey:

In the conduct of our trucking business over a period of years, our employes picked up freight from various locations in the city of Philadelphia and trucked that to the various railroad stations, for shipment outbound over the Pennsylvania Railroad and during that period I know of no instances where they tendered that for transportation at the warehouses of the Merchants Warehouse Company.

[fol. 636]. Recross-examination.

By Mr. Glasgow:

Q. Were those carload quantities?

A. We haul carloads and less than carloads. We do the largest trucking in the City of Philadelphia.

E. V. Sullivan was thereupon recalled as a witness and, being previously sworn, further testified as follows:

Direct examination.

By Mr. Hickey:

Q. Mr. Sullivan, is there a material difference between the service of loading and unloading carload freight at railroad freight houses in Philadelphia, and the service of handling carload freight at warehouses in the city of Philadelphia?

A. Yes.

Mr. Barnes: I object to that, Mr. Examiner, if that is to bind the Pennsylvania Warehousing & Safe Deposit Company.

Mr. Hickey: I will confine the question to the warehouses operated by the complainants.

The Witness: There is a marked difference in the handling of carload package freight at freight stations, as com-
[fol. 637] pared to the handling—unloading of carload package freight at warehouses. Treating your inbound carload freight first, the privilege of having your carload package freight unloaded at freight stations is more or less confined to concerns who are located in Philadelphia who must, perforce, immediately sign for the entire carload, and have facilities to take that carload into their warehouse. I would like to refer to complainants' exhibit No. 30, which is a list of prominent business concerns that customarily use warehouse service in marketing—warehouse distribution service in marketing and distributing their goods in Philadelphia and other large cities. In this list there are concerns such as Morton Salt, Post Products, Cocoa Cola, Campbell's Soup, and other large national distributors. The traffic of these concerns is really the backbone of the public merchandise warehouse business, and when they, for instance, decide to market their goods in foreign cities,—and by foreign cities, I mean any city other than that in which their plant is located—they must perforce make a continuing arrangement with some warehouse company to receive the carloads of their products, store as to marks, grades, sizes, and so forth, and have it available for immediate demands from their customers in lots of possibly a hundred pounds, 500 pounds or a thousand pounds. Now under Rule 23 of the Official Classification, the railroad—Pennsylvania Railroad or its employes, could not make a continuing arrangement to distribute carloads of package freight, transported at carload rates in small lots.

Hence these out of town manufacturers must make this arrangement with the public warehouse company. For a local concern to have its freight unloaded at a public freight station, he must immediately sign for the whole
[fol. 638] carload, and as soon as he does that, he immediately releases the railroad from any obligation as to loss by theft.

When he signs for this carload package freight at the railroad freight station, he immediately relieves the railroad from any responsibility as to loss and damage or pilferage, or from any other means. As is well known,

every carload of package freight contains a varied assortment of commodities, and as a result must be sorted in order to intelligently distribute it to the various concerns who call at the freight station for their goods; so that we have to secure from the railroad station, platform space, send down there labor to sort this carload package freight, according to marks and sizes, and other designation marks, and maintain watchmen service and labor there to deliver those various lots to the concerns who call at the platform for them.

This is evident to be uneconomical and, therefore, they use the services of the Merchants Warehouse to perform that duty. Even those concerns who do have facilities to assemble a carload of package freight on their own premises, very frequently use the services of the Merchants Warehouse Company, such as storage and trucking, or financing or some other such service.

You could find the various classes of freight that it would be impossible to distribute from freight stations, on our exhibit No. 37. Some of them are there, and some are new ones. As for illustration, the out of town manufacturer who would distribute in Philadelphia under continuing arrangements, could not use a public freight station for distribution.

[fol. 639] Brokers and selling agents, commission merchants could not use a public freight station for distribution of carload package freight, and all of those concerns requiring warehouse service for a part of a carload, and those concerns who distribute their carloads to two or more various individuals.

On outbound freight the exceptions to the Official Classification do not enable the carriers to allot platform space to freight forwarders, or any shipper to consolidate small l. c. l. lots and then tender them to the railroad for them to load the cars to be transported by the railroad as carload lots.

I can probably best illustrate the dissimilarity by referring to Mr. Richardson's testimony—he pointed out how essential it was to segregate and mark.

I have had occasion to use the telephone directory of the city of Philadelphia frequently in connection with our business. The stations of the three defendant carriers are

listed in that telephone directory. The telephone book of the city of Philadelphia is a source of information consulted by shippers for their use in communicating with the railroad stations in the city of Philadelphia.

The Merchants Warehouse Company, the Pennsylvania Warehousing & Safe Deposit Company, the Philadelphia Warehousing & Cold Storage Company, and the Quaker City Cold Storage Company are not included in the list of freight stations of the three defendant carriers listed in that telephone book.

The freight stations of the three defendant carriers are listed in the Classified Business Directory of Philadelphia, [fol. 640] Bell Telephone, under the classification "railroad companies."

The Merchants Warehouse Company, Pennsylvania Warehousing & Safe Deposit Company, Philadelphia Warehousing & Cold Storage Company, and Quaker City Cold Storage Company, are listed in that classified business directory under the classification "warehouses."

In that classified directory freight stations are listed under the heading of railroad companies and then there is a sub-classification of freight stations under that general heading of railroad companies.

Philadelphia, Pa.,
October 11, 1928—10:00 o'clock a. m.

Met pursuant to adjournment before Exam. Brown.
Appearances: Same as before.

Proceedings

Exam. Brown: Proceed, Mr. Hickey.

E. V. Sullivan resumed.

Direct examination continued:

[fol. 641] I have with me certain freight bills of the Pennsylvania Railroad and the Reading Company, showing names of consignors and consignees of shipments. (The witness produced freight bill No. 259041 of the Pennsyl-

vania Railroad Company, dated September 26, 1928, covering car GTW 575746.)

By Mr. Hickey:

Q. Mr. Sullivan, I direct your attention to a certain column or block upon that document, the document being entitled "Arrival notice," and a caption of the block reads as follows:

"Full name of shipper (origin and date, original car, transfer freight bill and previous waybill reference and routing when rebilled),"

and I will ask you to read the name typewritten under the words which I have read.

A. Hoover Co.

By Mr. Hickey:

Q. I direct your attention to the column or block on that arrival notice under the caption or heading, Consignee, address, final destination and additional routing, and I will ask you to read the typewritten inscription under that heading.

[fol. 642] A. The Hoover Co., Terminal Warehouse Company.

That is billing by the consignor to the consignor in care of the Terminal Warehouse Company. That is typical of considerable "care of" billing that we receive.

I have other documents here, both arrival notices or freight bills of the Pennsylvania Railroad Company and the Reading Company, showing substantially the information which I have developed from that arrival notice of the Pennsylvania Railroad, No. 259041.

At the time of adjournment I was testifying as to the loading and unloading of carload freight at railroad freight stations. When such freight is so loaded or unloaded, there is a trucking service involved between the railroad freight station and the party owning or shipping or receiving that freight and on carloads of freight handled at the Terminal Warehouse Company no such trucking service is involved because we have private sidetracks running into our buildings where the railroads place the cars, and we unload

the contents directly into the building. Or on outbound cars we load into the cars standing on those sidings.

When we receive inbound shipments of freight for our customers we regularly send them notices of arrival. In every instance we send them an arrival notice, noting in detail the amount, condition, marks, and so forth of the contents of that car, and that is mailed immediately after it is unloaded in our warehouse.

We get an arrival notice from the railroad in the form that has been shown here in an exhibit presented by Mr. Bikle. This arrival notice to which I refer is not the railroad arrival notice that we send, it is our own form. It is a warehouse service notice of arrival. That is nothing [fol. 643] extraordinary in the warehouse business, the sending of such notice of arrival. I believe every warehouse company sends this notice.

We give the railroads that serve our warehouse an individual report for every carload received at our warehouse, and on this report is noted the seal records, the amount and the condition, and all the information they desire.

Bad order packages in the cars are noted on the report that we make to the railroad, as well as to our customer. We perform repairs or cooperage service on damaged barrels, boxes and packages.

Cross-examination.

By Mr. Glasgow:

The tracks that get into our warehouse belong to the Terminal Warehouse. We have a lease with the Reading Railway Company for the building, known as Spring Garden Street storage. It is one of the buildings that we operate as a warehouse. We load and unload freight at that—not for the Reading Railway—but for our own account.

I do not believe we have an agreement with the Reading Railway Company as to the storage of freight that is not called for by the consignees, but we do receive some unclaimed freight from the railroad. We don't receive all. I cannot answer authoritatively as to who receives the balance, but I have been informed that the Pennsylvania Warehouse & Safe Deposit Company do. We receive some. Those are confined to shipments which may have originally

been directed to Willow-Noble street station of the Reading Company, and as our warehouse is very close to that station, the railroad company as a matter of convenience to the consignees store this with us. The storage is paid by whoever eventually withdraws it from the warehouse. It is known [fol. 644] as storage freight.

We also receive at our warehouse freight to be shipped—to be loaded for outbound shipment in some instances. It is negligible compared with the volume that we receive of incoming shipments.

We hold ourselves out as ready to receive any that is offered to us for outside shipment.

By Mr. Barnes:

I don't know as a matter of fact that we receive nearly all unclaimed freight from the Reading Company.

I cannot tell how much we received in the year 1927, but it is so small that it is negligible. It is one of the smallest factors of our business, but we do receive it from the Reading. I do not know that that is the greater amount of the unclaimed freight coming into the Reading Company. When that unclaimed freight comes into our warehouse, we pay the freight charges on it to the Reading Company and then we hold that for the period of time that is required by law, and sell it if charges are not paid.

The rate of storage that we charge on that unclaimed freight depends on the character of the merchandise. For your information I can say to you that handling this unclaimed freight for and on behalf of the Reading Company costs us thousands of dollars, because we never realize the amount of storage charges or the amount of advances which we have paid to the Reading Company.

When I said that we received a negligible amount of storage freight, I meant from a tonnage standpoint. We may receive one small shipment of 10,000 pounds, that may have three or four or five hundred dollars charges on it, which we pay to the railroad company. The tonnage may [fol. 645] not be great, but the amount of charges that we pay to the railroad company and which we later fail to realize at public sale, results in these losses that I have spoken of. We do not get those freight charges back when we have to sell the goods, in many, many instances,—in the

great majority of instances we don't. The business is highly undesirable from a warehousing standpoint.

The Terminal Warehouse trucks and hauls into its Race Street warehouse—we have no tracks there.

We are not doing any trucking for the Reading Company at the present time from Broad and Callow Hill. We only conducted experiments for a month or two.

We only leased one property from the Reading Company. I believe Pier 31 is included under Spring Garden Street Store, and that includes that little building across the street. To my knowledge there is just one lease between us and the Reading Company in existence.

EDWARD MCLOUGHLIN was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

I am engaged in the trucking business in the city of Philadelphia. I have been engaged in the trucking business in Philadelphia for myself the last three years and prior to that time I was in the trucking business for some one else. That is all I have done. My office is 2845 Belgrade Street.

In the conduct of my trucking business, I have had occasion to pick up freight at various points in the city of Phila- [fol. 646] delphia, and take that freight to the various railroad stations for outbound shipment.

In the conduct of my trucking business I have customarily called at those railroad freight stations and picked up freight, and trucked it to the parties I was directed to truck it to.

In the conduct of my trucking business I have become informed of the various railroad freight stations in Philadelphia, that customarily receive freight for outbound movement, and where I customarily receive inbound freight. I am also informed of the location of the several warehouses of the Merchants Warehouse Company.

I at no time became informed that the freight for our customers could be tendered for transportation via the Pennsylvania Railroad, by offering it at warehouses of the

Merchants Warehouse Company. I recently trucked some freight to a certain warehouse of the Merchants Warehouse Company, and there attempted to tender it for transportation outbound over the Pennsylvania Railroad. This was some time in February, 1928 at the Merchants Warehouse, 15th and Carpenter. I backed up against the platform with my truck. I got up on the platform. The man standing leaning on a broom, I asked him who is receiver, and he says John Laurel. He says he will be out in a few minutes. With that John came up. I handed him my bill of lading. He says What is this? I said, load of freight. He says, you are in the wrong place; we don't receive any freight here to ship. You want to go across the street. I says, this ain't no freight station? He says, no, this is the Merchants' Warehouse. That station across the street is Broad and Carpenter, but they call the station all about and along there Broad and Washington avenue.
[fol. 647] I took this freight to Broad and Washington avenue and shipped it. That is the freight station and I did ship it out from there.

The railroad employes there received it on the shipping documents which I had tendered at this Merchants Warehouse Company.

Cross-examination.

By Mr. Glasgow:

I was trucking that freight for Mr. Hickey who hired me. He hired me at Delaware Avenue and Brown. I seen Mr. Hickey standing across the street. The freight came from different places. I picked it up at a couple of stations. There were two different places I got the load. If I remember, there were a few washing machines, some of that health water, I think they call it. I just don't remember now on the bill of lading where it was to go. All of it was not to go to the same person—there were different shipments all on the same truck that I brought to the Merchants Warehouse Company.

I did not have on that truck a carload for one person. I did not have a carload on there for all the persons. It was a less than carload shipment that I proposed to ship in a number of small shipments to individuals. I don't re-

member who was paying the freight—whether they were prepaid or collect, or what they were. Mr. Hickey seen that I got paid for the hauling. The man came and gave me the money.

Mr. Glasgow: Now, if your Honor please, I move to strike this out—this evidence of the witness, for the reason it has no pertinency whatever to the inquiry here, because the contract provides for carload shipments of package freight, and the warehouse company has never held itself out and has never been engaged by the Pennsylvania Railroad Company, under its contract, for the shipment of less [fol. 648] than carload shipments, and this can have no more bearing on the question here involved than it could to the Irish Rebellion in 1848.

Redirect examination.

By Mr. Hickey:

As to whether I have got a truck that will hold a carload of freight, it is according to how much weight is in the car. I have no truck that will hold a carload of soap in boxes. I have no truck that will hold a carload of washing machines. I don't think I have any truck that will hold half a carload of washing machines. I know of no means of trucking carloads of freight to and from freight stations, except by trucking one load at a time.

I know of no means whereby I could put a whole carload of goods on my truck at one time, and tender it at a freight station at one time.

Recross-examination.

By Mr. Glasgow:

I don't know who had made out the bills of lading which I carried to exhibit to the place—I had them. None of those bills of lading showed that I intended to offer a carload for shipment. I did not tell the man on the platform, Mr. Laurel, that I spoke of, that I wanted to ship a carload of freight. I handed him my bills and told him I had a load of freight. I did not tell this man that I didn't have a carload of freight, but the bills of lading showed what I wanted to ship. I don't think it was a carload.

Examiner Brown: This evidence will stand and will be considered in connection with Mr. Glasgow's objection.

GEORGE W. HOOVER was thereupon called as a witness and, being first duly sworn, testified as follows:

[fol. 649] Direct examination.

By Mr. Hickey:

I heard the testimony of Mr. McLoughlin, and without going into all the details, I will say I tendered some freight at a warehouse of the Merchants Warehouse Company, for outbound shipment on or about the 25th day of January, 1928, at the River Front Stores, Merchants Warehouse Company.

I was demonstrating for Mr. Hickey, La Peer Trailer Company, office at 702 Beach Street, where I had orders from my office boss, Mr. C. B. Harvey, to make a demonstration for Mr. Hickey, where I would find the trailer at Delaware Avenue and Spring Garden Street, loaded. I took my tractor, picked up this trailer in which there was a man waiting with the bill of lading for the shipment. I proceeded down Delaware Avenue with my trailer, going to the River Front Stores. I backed up to the platform, jumping on the platform and asking where the receiver was, and I believe a gentleman by the name of Mr. Costello came forward, and I says, "Can I ship this load of freight from here?" He says, "Let me have your bill of lading." I handed over the bill of lading, and he says, "Oh, no, this is not a freight station." He says, "You will have to take that across the street, or some other freight station."

I jumped down off the platform again, got on my truck, drove away and took it to the Schackamaxon Street freight station.

I tendered it there for transportation with the same shipping orders. The railroad employes accepted it, signed the bill of lading. That is Shackamaxon Street freight station of the Pennsylvania Railroad Company.

[fol. 650] Cross-examination.

By Mr. Glasgow:

I had about 20 bills of lading. There was a whole crowd of them. I believe there were 20 different people. I do not know where any of it was to go. I believe it was part of a carload—it was only one of the first loads that I have taken. I only took that one load and the next day I was knocked off the shipment. I wasn't told to take it any more. I never did take a whole carload there and offer it for shipment.

What I had was a trailer load, with different kinds of commodities, to be shipped to about 20 different people. The kind of commodities were various things, grape juice, washing machines, wringers, and so on and so forth—miscellaneous stuff. I did not tell the man Costello that I saw there that I wanted to ship a carload of freight. I handed him the bills of lading. I did not tell him that I had any more besides what I had there. He told me that that could not be shipped there—told me to go across the street to the nearest freight station.

Mr. Glasgow: Now Mr. Examiner, I do submit that you ought not to permit this record to contain evidence of their being unable to ship less than carload freight at the Merchants Warehouse Company, when there never has been the slightest contention that either the railroad company or the warehouse company held itself out as receiving less than carload shipments at the terminals known as the warehouses.

Examiner Brown: Do I understand your statement means a motion to strike out the testimony?

Mr. Glasgow: I do, sir.

[fol. 651] Redirect examination.

By Mr. Hickey:

I was not able to haul a whole carload of these goods to the railroad station at one time. I did not make any explanation to Mr. Costello of what I had—only handing him the bills of lading. I handed Mr. Costello the bills of lading, and going over them, he looked through them and he says,—to repeat exactly what Mr. Costello said to me—

"Oh, hell, no, this is no freight station." He says, "The freight station is across the street, that is where you want to go." He did not leave me any opportunity to tender any more.

Recross-examination.

By Mr. Glasgow:

Nobody ever asked me to haul a carload of freight to the warehouse company for shipment at one time.

Examiner Brown: This evidence will stand subject to Mr. Glasgow's objection. In other words, I am making the same ruling in respect to this witness as I did the last.

George M. Richardson was thereupon recalled as a witness and, being previously sworn, testified as follows:

Direct examination.

By Examiner Brown:

Q. Have you, Mr. Richardson, recently, or ever, received carload shipments of freight at any of the Merchants' Warehouses, from any person?

A. Yes.

Mr. Bikle: You mean in the warehouses of the Merchants Warehouse that are included in these contracts?

Examiner Brown: Yes.

[fol. 652] The Witness: I understood you to ask me whether or not we had accepted from teams or trucks, freight tendered to us by shippers, patrons of the Pennsylvania Railroad for carload shipments, that we are obligated under our contract to receive, load, properly stow and forward in accordance with shipper's instructions; yes, sir.

Mr. Hickey: You see, the witness keeps interpolating this thing about this contract. The contract does not obligate the Merchants Warehouse Company to receive a pound of freight for outbound movement. You did not put that in your question. You see the witness is ready to in-

terpolate that and interpolate this tonnage business in every answer that he makes, into this contract.

I move to strike out what the witness said about that contract. Those agreements are in the record, and they are for argument by Mr. Glasgow, Mr. Bikle and myself.

Examiner Brown: The witness' statement in respect to contracts will not be considered in evidence. The only thing I want is the facts, whether or not your warehouse has actually received carload shipments of freight from the outside public, for delivery to the Pennsylvania Railroad Company?

The Witness: Yes sir.

Examiner Brown: You have done that?

The Witness: Yes sir.

Examiner Brown: How recently?

The Witness: Yesterday.

[fol. 653] E. F. Morgan was thereupon recalled as a witness and, being previously sworn, further testified as follows:

Direct examination.

By Mr. Hickey:

I testified at the hearing in Washington. I have visited the various railroad freight houses in the city of Philadelphia, and the warehouses operated by the warehouse companies that receive the allowances under consideration. I have seen them all. I have viewed them all, but I have not been in them.

On my visits to the railroad freight houses, I observed the painted signs that show the name of the railroad com-[fol. 654] pany. For example, the Shackamaxon freight station of the Pennsylvania Railroad at Delaware Avenue and Laurel Street, has a sign on the upper portion of the building—large painted letters, plaintly visible from the street, reading: "Pennsylvania System, Shackamaxon Freight Station." It also has a sign with the same wording on the Delaware Avenue side of the office building.

Second and Berks Street station of the Reading Company has a sign on the upper section of the building, with a large painted sign,—large sign, reading: "Reading Company, 2nd and Berks Street Freight Station."

Baltimore & Ohio Station at 24th and Race, has also a sign on the upper portion of the building, reading: "Baltimore & Ohio Railroad Freight Station."

Without dealing with these 20 or more freight stations I will summarize what I saw at these other railroad freight stations. Each of the stations had a sign of similar portent on them, one or more, indicating that they were railroad freight stations. I also visited those warehouses. None of those warehouses bore signs indicating that they were railroad freight stations.

The River Front Stores of the Merchants Warehouse Company has a very large sign on the upper portion of the building on the Delaware Avenue side, reading: "River Front Stores, Merchants Warehouse Company."

Summarizing the others of the Merchants Warehouse Company, without going into them in detail, they all had signs, bearing the names "Merchants Warehouse Company," and as a general rule the specific name of the [fol. 655] store, in one or more places. Proceeding to the Pennsylvania Warehousing & Safe Deposit Company's warehouses, for example, the Pennsylvania Warehousing & Safe Deposit Company's warehouse at the corner of Delaware and Pine Street, has a sign painted in large letters on the Delaware Avenue side, reading: "Pennsylvania Warehousing & Safe Deposit Company;" on the Pine Street side, reads: "Pennsylvania Warehousing & Safe Deposit Company," Delaware Avenue stores—Pennsylvania stores—tobacco stores.

Summarizing what I saw at the other warehouses of that company, they all had signs on them bearing the name of the company, Pennsylvania Warehousing & Safe Deposit Company, with one exception. I think the Atlantic Stores did not have the name of the company on there, but had the name "Atlantic Stores," embedded in the stone on the side of the building.

These painted signs I described, were visible to any one on the public streets near these railroad stations and near these warehouses. There was one exception at the 31st

and Chestnut warehouse of the Merchants Warehouse Company, there is a sign over the windows of one room, reading: "Pennsylvania System Freight Agent," and there is a similar sign, a small sign over the door leading into that room. That is the office of Agent Lukens of the Pennsylvania Railroad.

Cross-examination.

By Mr. Glasgow:

In other words, that freight agent had an office in that building and there was a sign over his own door.

[fol. 656] EDMUND FUNCK, Assistant General Freight Agent of the Pennsylvania Railroad Company, was thereupon recalled as a witness and, being previously sworn, further testified as follows:

Direct examination.

By Mr. Hickey:

During my examination I was asked if the allowances given to the Merchants Warehouse Company were given on both carload freight traffic and less than carload freight traffic. Afterwards I was asked to make a special study of the matter and give the results of my study. I examined some of our records, and found that we made the payments on carloads and less than carloads. These allowances are paid on both carload and less than carload traffic inbound and outbound.

I could not state the proportions of the tonnage of each of those traffics in terms of percentage, but in an endeavor to answer your question, I would put it this way: The preponderance is inbound carloads. Then at some of the warehouses there is a quantity of inbound less than carloads, but not nearly so great as the inbound carloads.

Outbound there are some carloads and some less than carloads, but the less than carloads outbound are relatively small.

At one station—you realize I did not have much time on this—at one station the outbound, as I recall it, was about

6600 pounds a day on an average, for I think it was 10 days.

By carloads I do not altogether mean carload freight, [fol. 657] transported at carload rates. There is a general understanding—that is the general understanding, but I found this condition, and as to this I did not actually see a waybill: this was reported to me, and perhaps you will call it hearsay. They tell me that as to River Front Stores, the outbound less than carload would go from River Front Stores to our Philadelphia transfer. Philadelphia transfer is on the western outskirts of the city of Philadelphia, and that is where we would transfer less than carload freight for its ultimate destination, Baltimore, Chicago, New York, New England, or whatever it would be; so that as to the less than carload outbound, it would go in a solid—what we call ferry car to Philadelphia transfer, and that might show up as one carload of 40,000 pounds, but it would actually consist of a number of less than carload shipments; but as to the others, it was with respect to specific less than carloads.

Just to clear that up, if I haven't, there is no merchandise car from River Front Stores to Chicago, for example. Do you know what I mean? Do you know what I mean by a merchandise car, so that it would go to a transfer? I mean a through car, by a merchandise car, an express car.

As to other than that exception, when I speak of carloads, I meant virtually a carload under the classification, and when I speak of a less than carload, I meant a less than carload under the classification. I meant carload freight under the classification, transported at carload rates specified therein with this exception, that if by any chance there was an any-quantity shipment in that lot that happened to [fol. 658] weigh twenty or forty thousand pounds, that would show up in that manner.

Cross-examination.

By Mr. Bikle:

Yesterday Mr. Gallagher referred to a conversation with Mr. William Hammersley and also Mr. Lindsay. Mr. Hammersley's relation to the Pennsylvania Railroad is freight agent at Walnut street wharf.

There are other freight agents in Philadelphia at other stations. Some of the warehouses of the Merchants Warehouse Company are within Mr. Hammersley's jurisdiction as a freight agent, namely, River Front Stores and Webb Terminal—no others. Mr. Lindsay, to whom Mr. Gallagher referred, is Mr. Hammersley's chief clerk, as I understand. He is a subordinate of Mr. Hammersley.

Robert Beatty, Jr., was thereupon recalled as a witness and, being previously sworn, further testified as follows:

Direct examination.

By Mr. Hickey:

I have done business with the Merchants Warehouse Company for a number of years and it has handled inbound freight for me.

I never received that form of notice of arrival—Pennsylvania Railroad notice of arrival in exhibit No. 80—from the Merchants Warehouse Company on any of our freight. I received another form of notice. I have that form with me.

Q. Will you produce it and show it?

[fol. 659] (Witness produces form.)

Mr. Hickey: I offer in evidence the notice produced by the witness.

Exam. Brown: This will be received as complainants' Exhibit 97.

Cross-examination.

By Mr. Glasgow:

The form which I did receive gave me all the information I desired. I raise no objection to the form in which it is given. This kind of notice has been given to me in exhibit 97 ever since I have been doing business with the Merchants Warehouse.

By Mr. Bikle:

I do not get any notice on the form showed me in exhibit 80, from the warehouse. I did not get any such form from

anybody else, so that this (exhibit 97) was the only notice I got of the arrival of the shipments. I am satisfied with this as a notice giving me what I want to know about the arrival of the shipment.

Redirect examination.

[fol. 660] By Mr. Hickey:

The only other warehouse that I received notices from was the warehouse with which I have personal connection. I had no need to receive any special notice—would not have paid any attention to them if I did, because I was right on the ground myself.

The only two warehouses I deal with are the Merchants Warehouse Company and this warehouse company that I am an officer of.

Recross-examination.

By Mr. Glasgow:

I am not doing business with any other warehouse. I never received shipments through any other warehouse than the Merchants or the one with which I am connected during the period of my present business activity, namely, during the last four years.

I am interested in the Industrial Cold Storage & Warehouse Company, and I am also a representative of the American Products Sales Company, for whom I receive these notices.

Hugo Oberg was thereupon called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hickey:

During the past four years I have specialized in commerce work, in connection with rate cases before the Interstate Commerce Commission. I have had over 30 years rate and traffic experience, having been employed by the

Pennsylvania Railroad at Washington Avenue wharf, Philadelphia, as a rate clerk; also had charge of revising the inbound billing for the Pennsylvania Railroad at station Pier 27, North River, New York.

I was employed by the Trunk Line Association, 143 Lib-
[fol. 661] erty Street, New York, for about seven years.

Was in the employ of the Interstate Commerce Commission over 12 years, first, in its tariff and rate department, and during seven years of that time was a member of the Commission's Board of Suspension.

Was employed by the United States Railroad Administration in the Division of Law, for about two years.

For more than 10 years I was employed at one of these freight stations in Philadelphia—Washington avenue wharf—where I was engaged in computing freight charges.

I examined the published tariffs of the Pennsylvania Railroad Company on file with the Interstate Commerce Commission at Washington, with the purpose to ascertain at how many of its stations it gives allowances to warehouse companies, at how many it does not give such allowances, as is reflected in its published tariffs.

The list of freight stations published by that carrier in its tariff GO ICC 14700, now in effect, shows that there are several thousand freight stations on the Pennsylvania Railroad lines, Buffalo, Erie, Pittsburgh and east.

The practice of paying allowances to operators of warehouses for loading and unloading carload freight, as shown by the tariffs of the Pennsylvania Railroad, is confined to four points, namely, Philadelphia, Baltimore, Washington and Communipaw, N. J., and it is restricted to one or two such warehouse companies at each of these points named in the tariff. The provisions purporting to provide for the allowances to those warehouse companies at such four points appears in Pennsylvania Railroad Company tariff GO I. C. C. 14400. I have prepared excerpts of that tariff.

[fol. 662] Mr. Hickey: I offer the statement in evidence, containing the excerpts referred to by witness Oberg. I might state that that amplifies the showing in Mr. Funck's exhibit No. 62, to this extent: It reproduces the exact language of tariff GO I. C. C. No. 14400, relating to the allowances.

Examiner Brown: This will be received as complainants' exhibit No. 98.

Under that tariff, the allowance is confined to two warehouse companies, the Merchants Warehouse Company and the Quaker City Cold Storage Company at Philadelphia, Pa., and those two warehouse companies are named therein as the only ones to whom the Pennsylvania Railroad Company will make such allowances at Philadelphia. Referring to exhibit No. 60, introduced by witness Funck, and more especially to the following read from that exhibit:

"In the application of storage rules and charges as published in Agent B. T. Jones' I. C. C. No. 1491, PSC-Pa. No. 86, agent's index No. 54, supplements thereto or reissues thereof, the following warehouses in Philadelphia, Pa., are considered freight stations during the free time."

I have examined the Jones' tariff referred to in that exhibit. In my opinion as a tariff expert the provisions read may not in susbtance be applicable at warehouses of the Merchants Warehouse Company.

The reasons for my opinion are that the substance of the storage rules are provisions under which storage charges can be accrued, computed and charged. When separated from those rules of substance, as is the attempt here, the [fol. 663] provisions relating to free time are of no force or substance and they cannot be applied to any computation of charges, or be used for any useful purpose whatever. This is my interpretation of the tariff. Further, the title page of the Jones' tariff reads:

"Governing storage rules and charges applicable to freight in carload quantities stored in or on railroad premises of railroads shown on pages 4 to 9, inclusive, hereof."

Rule 3, of that tariff, provides for 48 hours free time detention of freight when stored or held in the possession of the carrier in or on premises or tracks of the defendant railroad companies.

The provision on the title page and in rule 3 of that tariff negative the application of the rule published therein to freight in the possession of warehouse companies. There-

fore, there is no foundation in the storage tariff for the alleged 48 hours free time for freight in the possession of warehouse companies at Philadelphia.

The demurrage tariff of Agent Jones, I. C. C. No. 2003, applicable to the detention of railroad cars held for or by consignor or consignee for unloading or any other purpose, the car demurrage rules apply to the detention of railroad cars, and do not apply to the storage and handling of freight.

Therefore, the demurrage tariff does not afford any foundation for the so-called period of free time on freight in the possession of any warehouse company in Philadelphia.

[fol. 664] I found no foundation in the published tariff for any alleged 48 hours free time on any freight after it has been delivered by the Pennsylvania Railroad, in cars, to any warehouse in Philadelphia.

Cross-examination.

By Mr. Glasgow:

The number of that Jones' tariff that I referred to—the one before the last tariff—is I. C. C. No. 1876. That is the tariff that I say provides for 48 hours free time at stations of the railroads named therein. I take it that it applies at stations of the carriers. If there is a tariff on file, designating what are its stations, why then, the tariff that I have referred to would apply to those stations of the railroad company.

Pennsylvania Railroad tariff GO I. C. C. No. 14700 designates all of the stations on the Pennsylvania Railroad, and it applies at all of those stations.

The tariff would apply to any of the stations named as stations in the Pennsylvania Railroad's official list of stations. It would apply to any that the Pennsylvania Railway Company had designated in tariff No. 14700. All the stations of the Pennsylvania Railroad are named in that tariff.

The 48 hours free time tariff would apply to all stations designated in the official list of stations, which is I. C. C.—GO I. C. C. No. 14700. All the stations are named in there.

The Merchants Warehouse is named in there. Supposing there is another station, it would not apply to that. There is no other list I know of. There are some other railroads in the list west of Pittsburgh. The tariff as to the 48 hours free time would apply to any station which the Pennsyl- [fol. 665] vania Railroad Company had properly designated as a station.

Q. Now then in tariff GO I. C. C. No. 14322, Rule 32, I find this:

"In the application of storage rules and charges as published in Agent B. T. Jones' I. C. C. No. 1491, PSC No. 86, agent's index No. 54, supplements thereto and reissues thereof, the following warehouses in Philadelphia are considered freight stations during the free time,"

and among those is the Merchants Warehouse Company, Pennsylvania Cold Storage and Market Company. Now then, why is it that the 48 hour tariff does not apply to——

A. I would say they are not the stations of the Pennsylvania Railroad.

Q. You say they are not. The Pennsylvania Railroad Company says they are, don't they?

A. They say they consider them, I guess. I don't know who considers them.

Q. They say they consider them?

A. I think that is indefinite.

Q. Well, you say they are not, but the Pennsylvania Railroad says they are, don't it?

A. I don't know as they do say that. They say they will be considered during free time——

Q. If you are going to consider a thing as a horse, that is your statement of what the horse is, is it not?

A. In the application of storage rules and charges, they are certainly not applied to storage charges in the Jones' tariff.

[fol. 666] Q. It says storage rules and charges, then that would be storage rules, would it—would be the question of whether there was free time and storage wouldn't it?

A. I don't see how they could apply the storage rules there.

By Mr. Glasgow:

I understood you to say that the tariff as to 48 hours free time, applied to any point where the Pennsylvania Railroad Company had properly designated as a station?

A. I said that stations named in GO tariff I. C. C. 14700.

Q. You went further, did you not, and did you not finally say that it applied to any point that the Pennsylvania Railroad Company had properly designated by tariff as one of its stations?

A. On the Pennsylvania Railroad.

Q. Or along its line?

A. Along its line, yes; lines east of Pittsburgh.

By Mr. Bikle:

I am not a lawyer. In my testimony, in giving this opinion, I partly predicated it on the suggestion that the goods were in the possession of the warehouse company, during this period of so-called free time.

I think I am competent to express an opinion as to who has the legal possession of those goods, as an experienced railroad man, but not as an attorney.

If I got off a railroad train and handed my grip to a red capped porter, I do not know in whose legal possession that is.

I am not undertaking to say in whose legal possession these goods are during the free time.

[fol. 667] Redirect examination.

By Mr. Hickey:

Mr. Oberg, I noticed during your examination by Mr. Glasgow, that you did not look at that tariff provision and deal with the particular tariff that it attempted to make applicable at warehouses of the warehouse company. Did I understand that correctly?

A. I did not attempt to deal with the particular, no.

Q. You and Mr. Glasgow were talking about some tariff provisions that are not on that exhibit 60, were you not?

A. He mentioned stations west of Pittsburgh, among other things.

Q. Does that appear anywhere on that exhibit?

A. No.

Q. Wasn't your testimony confined to what appears on that exhibit, Jones' tariff I. C. C. 1491?

A. Yes.

(Witness excused.)

OFFERS IN EVIDENCE

Mr. Hickey: I will not call additional witnesses. I have some documentary evidence to offer.

Yesterday, the witness Richardson identified a list of tenants of the Merchants Warehouse. I now offer that list in evidence, and I show counsel the paper that was identified by the witness, and notation entered thereon by Mr. Glasgow. To the best of my knowledge and belief we have made an exact reproduction of that paper. I show the original and the copy to counsel. I offer that list in evidence as exhibit 99.

I also offer in evidence, Pennsylvania Railroad Company list of private sidings, steamship lines' piers, and carload and less than carload delivery, and so forth, F. D. No. 199 and supplements 2 and 6 thereto. Those documents [fol. 668] were identified by the witness Funck.

Mr. Hickey: I now offer in evidence, Reading Company's circular No. 225, containing a list of manufacturers, merchants, public storage houses, grain elevators, and so forth; also supplement No. 1 to Circular No. 225; also supplement No. 2 to circular No. 225. That circular No. 225 has been identified by the witness Gheen. It is of the same character as the preceding exhibit.

I now offer in evidence Baltimore & Ohio Railroad Company circular No. 799, entitled Names and locations of principal firms and industries, and so forth.

I also offer supplement No. 1 to that circular No. 799, and ask that they be marked exhibit No. 102.

Those circulars were identified by the witness Sands. They are of the same character as exhibit No. 100.

Examiner Brown: These exhibits will be received as complainants' exhibits Nos. 99 to 102, inclusive.

(The same were thereupon received in evidence, marked "Complainants' Exhibits Nos. 99 to 102, inclusive."

Mr. Hickey: Complainants rest.

SUB-REBUTTAL

GEORGE M. RICHARDSON was thereupon recalled as a witness and, being previously sworn, further testified as follows:

Direct examination.

By Mr. Glasgow:

The warehouses of the Merchants Warehouse Company in the jurisdiction of Mr. Hammersley are River Front Stores and what is designated here as Webb Terminal. I [fol. 669] made an examination of the records to determine the number of cars that were loaded outbound at those warehouses, and either in whole or in part delivered to us by team. There were only two cars from the period January 1st until September 30, 1928.

I made a like examination as to the number of cars of like traffic loaded by us for the same period at all our warehouses in Philadelphia, except one which was a little warehouse in Kensington. I had no opportunity to check that warehouse, but the others I did.

Q. How many cars did you load outbound in which the traffic was either delivered to you from the trucks bringing it in, or which had been stored in your warehouse by the consignor or shipper and loaded from that point?

A. Well, my investigation would not be complete to cover all of the outbound tonnage, but any car that was hauled to us by team—any freight that was hauled to us by team, either in whole or in part, I have investigated.

Q. How many of those cars were there from January 1st to September 30th?

A. 744 cars.

Q. To your knowledge, Mr. Richardson, has the Merchants Warehouse Company ever declined to receive for outbound shipment any carload traffic that was offered to it?

A. No sir.

Q. I understood you that in all of those cars, the traffic was brought by team to your warehouse and loaded then into cars?

A. That is correct.

[fol. 670] Mr. Glasgow: I have no other questions.

Examiner Brown: Cross examine.

Mr. Hickey: No cross.

(Witness excused.)

Examiner Brown: Any further tectimony in this case?

(No response.)

Examiner Brown: Briefs will be due December 6, 1928.

Examiner Brown: Is there anything further in this case?

(No response.)

Examiner Brown: The hearing is closed.

Thereupon, at 12:35 P. M. on October 11, 1928, the hearing in the above matter was closed.

[fol. 671] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 5781

In Equity. No. 5789

In Equity. No. 5791

[Titles omitted]

STIPULATION RE STATEMENT OF EVIDENCE—Filed Jan. 7, 1931

It is hereby stipulated by the parties, including the interveners, acting by their respective counsel, for the purpose of settling the record for the appeal to the Supreme Court of the United States, that:

[fol. 672] 1. The within and foregoing statement of evidence is a true and correct transcript of the stipulations and statements of counsel made and contains a correct statement in narrative form of all the oral testimony introduced before the District Court at the hearings in the above-entitled causes and before the Interstate Commerce Commission in the proceedings styled James Gallagher et

al. v. The Pennsylvania Railroad Company, Docket No. 20968; Walter A. Bailey et al. v. The Baltimore & Ohio Railroad Company, Docket No. 20968, Sub-No. 1; and Rex & Company, Inc., et al. v. Reading Company, Docket No. 20968, Sub-No. 2, as the same is contained in the official typewritten transcript thereof on file with the commission, a copy of which, duly certified by the commission, was offered in evidence in behalf of all the petitioners jointly in the District Court in the above-entitled causes; and said oral testimony together with the exhibits referred to therein, was all the evidence offered by any of the parties at the hearings before the District Court.

2. The said narrative of the oral testimony shall be substituted for the original testimony of the witnesses and shall have the same force and effect upon appeal as the original testimony.

3. The exhibits contained in the transcript so certified by the commission shall stand as original exhibits and shall be transmitted on appeal instead of transcripts thereof; and the original of said statement of evidence together with [fol. 673] this stipulation and the order of the court pursuant hereto shall be likewise so transmitted.

M. Hampton Todd, Allen S. Olmstead, 2nd, Counsel for the Merchants Warehouse Company, petitioner in No. 5781. H. Edgar Barnes, Counsel for the Pennsylvania Warehousing & Safe Deposit Company, petitioner in No. 5789. John F. Connelly, Counsel for the Philadelphia Warehousing & Cold Storage Company, petitioner in No. 5791. Allen S. Olmstead, 2nd, Counsel for the Commercial Exchange of Philadelphia et al., Intervening Petitioners in Nos. 5781, 5789, and 5791. Elmer B. Collins, Special Assistant to the Attorney General. J. Stanley Payne, Counsel for Interstate Commerce Commission. John J. Hickey, Counsel for James Gallagher et al., Intervening Defendants in Nos. 5781, 5789, and 5791.

[fol. 674] IN UNITED STATES DISTRICT COURT

In Equity. No. 5781

In Equity. No. 5789

In Equity. No. 5791

[Titles omitted]

ORDER APPROVING STATEMENT OF EVIDENCE—Filed Jan. 7, 1931

[fol. 675] On the written stipulation of the parties it is ordered that—

1. The within and foregoing statement of evidence in narrative form is hereby approved.

2. All exhibits in their original form, as they are included in the certified transcript of evidence before the Interstate Commerce Commission in its dockets Nos. 20968, 20968 Sub. No. 1, and 20968 Sub. No. 2, offered and received in evidence herein under the Commission's certificate, and the original of the statement of evidence in narrative form, shall be incorporated in the record. They contain all the evidence submitted to this court on the hearings of these causes, and shall be transmitted by the Clerk to the Supreme Court of the United States in lieu of the certified copy of the evidence in the proceedings before the Commission.

J. W. Thompson, United States District Judge.

[File endorsement omitted.]

[fol. 676] 1 and 2

EXHIBIT NO. 1

This agreement made this twenty-fifth day of January in the year of our Lord one thousand nine hundred and seventeen (A. D. 1917) between The Pennsylvania Railroad Company, hereinafter called the "Railroad Company," party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the "Warehouse Company," party of the second part;

Whereas, the parties hereto desire to enter into an agreement with respect to the handling and storage of flour,

grain and other merchandise at the warehouses of the said Warehouse Company situated on the plot of land bounded by Delaware Avenue, Walnut, Water and Chestnut Streets, in the City of Philadelphia, and State of Pennsylvania;

Now, therefore, this agreement witnesseth:

First. That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouses situated on said plot of land, and to promptly do the necessary shifting to enable its cars to reach the warehouses aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouses the amounts following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month, two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and during the first two years of the life of this [fol. 677] agreement, forty cents (40¢) per ton (of 2,000 pounds) for each ton of merchandise, and during the following years that the agreement is in force, thirty-five cents (35¢) per ton (of 2,000 pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company.

(c) That so long as this contract is in force it will not enter into any contract with any other person or corporation, making any allowance for terminal services in connection with the loading and unloading of merchandise to or from the warehouses located within the City of Philadelphia, nor shall it during the same time engage in the busi-

ness of warehousing merchandise in the City of Philadelphia, except as hereinafter provided. Provided, however, that this covenant shall not be construed so as to prevent the Railroad Company from warehousing freight in its terminals as an incident to delivery thereof or from entering into contracts for storage or other disposition of refused or unclaimed freight, nor shall it be so construed as to interfere with the performance by the Railroad Company of all obligations imposed upon it by law in respect to the carriage, storage or delivery of traffic. Provided, further, that in the event of the Railroad Company building any additional storage warehouses within the City of Philadelphia, either in connection with its freight stations or otherwise, the Warehouse Company shall have the option of renting or leasing such storage warehouse at a fair rental fixed by the Railroad Company, which option must be exercised by the Warehouse Company within sixty days after the same is offered to it by the Railroad Company; and only in the event of the Warehouse Company not being able or willing to undertake the operation of such warehouse, or warehouses, shall the Railroad Company be at liberty to engage in the business of warehousing merchan- [fol. 678] dise in said warehouses, and in the event of the Railroad Company engaging in such warehouse business the same shall be conducted on a commercial basis with due regard to the current storage rates at similar warehouses in the city of Philadelphia.

Second. The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's System, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines: it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceeding month, excepting, however, any such charges which the Railroad Company may, from time to time elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

(d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freights in the custody [fol. 679] or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as it holds the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouses, to be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouses in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its warehouses before delivery without charge to the consignees, freight

delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the [fol. 680] purpose of realizing its charges thereon.

Fourth. It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceedings the effect of which shall be to divest the title or possession of the said Warehouse Company, this agreement shall, at the option of the Railroad Company, cease and determine: Provided, however, that nothing contained in this paragraph Fourth shall be construed to prevent the assigning of the income and revenues to the Merchants' Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth. This agreement shall take effect as of the first day of February, A. D. 1917, and shall continue in full force and effect for the term of twenty (20) years from said date, that is, until the first day of February, A. D. 1937, and thereafter from year to year unless and until terminated at the end of said period of twenty (20) years or at the end of any one year thereafter by either of the said parties hereto giving six (6) months previous written notice to the other of its intention so to do; Provided, however, that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days written notice to the Warehouse Company, cease and determine and become absolutely void.

Sixth. That if the terms and conditions of this agreement shall be found to work onerously to the interests of either party hereto, the said terms and conditions shall, at the written request of either party, be subject to revision at the end of any period of two years; and if the parties hereto cannot agree upon such revision, or any question shall arise as to the proper construction of any of the provisions herein contained, or difference as to any act or duty claimed to be involved in the performance hereof, if the same cannot be amicably adjusted, then the [fol. 681] same shall be settled by arbitration as follows: The party demanding the reference shall serve upon the other party a notice of such demand, stating the question upon which it demands the judgment of the references, and the name of one referee by its chosen. The party so notified shall, within ten days after receiving such notice, select a second referee, and notify the other party thereof in writing or if he shall fail to select a referee the referee selected by the party demanding the reference shall select the second referee. The referees so selected shall within a reasonable time meet and select a third referee, and fix a time and place for hearing the parties, of which they shall be notified in writing. If any referee shall refuse to act, the party by whom he was chosen shall select another to act in his place. The award of any two of said references made after hearing the party or parties who have attended in compliance with the notice required to be given, as above stated, shall be final and binding on the parties, and they severally hereby expressly agree to be bound thereby.

Seventh. This agreement and all its provisions shall be binding upon and enure to the benefit of the successors and assigns of each of the parties hereto.

In witness whereof the said parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by Geo. D. D. Moy, Vice-President. Attest: J. ——— Wilson, Assistant Secretary. Merchants' Warehouse Company, by Harvey C. Willis, President. Attest: Jacob M——, Jr., Act. Secretary.

Signed, sealed and delivered in the presence of ——.——.

[fol. 682] [Endorsed:] James Gallagher et al. vs. The P. R. R. Co. I. C. C. Docket No. 20968. Exhibit No. —. Witness: —— ——. Document must be returned to the office of the secretary, Broad Street station, Philadelphia. A4125. Agreement between The Pennsylvania Railroad Company and Merchants' Warehouse Company providing for the handling of freight and collection of charges thereon at warehouse located at Delaware Avenue, Water, Walnut and Chestnut Streets, Philadelphia, Pa. Dated 25th January, 1917. The Pennsylvania Railroad Company.

[fol. 683] (3)

Know all men by these presents that the Merchants' Warehouse Company, a corporation organized and existing under the Laws of the State of Pennsylvania (hereinafter called the Warehouse Company), as Principal, and Indemnity Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania as surety, obligors, are held and firmly bound unto The Pennsylvania Railroad Company (hereinafter called the Railroad Company), obligees, in the sum of Two Thousand (2,000) Dollars, lawful money of the United States of America, to be paid to the said The Pennsylvania Railroad Company, its certain attorneys, successors or assigns, to which payment, well and truly to be made the said obligors do bind themselves and each of them, their and each of their successors and assigns, jointly and severally, firmly by these presents. Sealed with their seals and dated the twenty-eighth day of July in the year of our Lord one thousand nine hundred and twenty-seven (A. D. 1927).

Whereas, the above named Warehouse Company has entered into a certain agreement with the said Railroad Company bearing date of twenty-eighth day of July A. D. 1927, (a copy of which agreement is hereto attached and made a part hereof as fully and with the same effect as if herein fully set forth) with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company situated on the plot of land bounded by Delaware Avenue, Kenilworth Street, Penn Street and Bainbridge Street, in the City of Philadelphia, and State of Pennsylvania.

And whereas, it is in said agreement provided "in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient securities and in such amount as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

Now the condition of this obligation is such that if the above bounden Warehouse Company shall and do make prompt payment of the said freight and other charges in said agreement called for, and shall and do perform all its other covenants and each and every covenant in said agreement provided for by it to be performed according to the true intent, purpose and meaning of the said agreement, then the obligation is to be void, otherwise to be and remain in full force and virtue.

Merchants' Warehouse Company, by Harvey C. Miller, President. Attest: S. Townsend Zook, Secretary. Indemnity Insurance Company of North America, by M. M. Dickinson, M. M. Dickinson, Attorney-in-Fact.

Signed, sealed and delivered in the presence of: M. M. Feeley.

[fol. 684] This agreement made this 28th day of July in the year of our Lord one thousand nine hundred and twenty-seven (A. D. 1927) between The Pennsylvania Railroad Company, hereinafter called the "Railroad Company", party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the "Warehouse Company", party of the second part;

Whereas, the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company situated on the plot of land bounded by Delaware Avenue, Kenilworth Street, Penn Street and Bainbridge Street, in the City of Philadelphia, and State of Pennsylvania;

Now, therefore, this agreement witnesseth;

First. That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouse, and to promptly do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing, at the said warehouse the amounts following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month; and thirty-five cents (35¢) per ton of two thousand (2,000) pounds for each ton of merchandise; except that no payment shall be made by the Railroad Company for freight which, upon arrival at its destination, is or has been unclaimed or refused by the consignee and has been stored by the Railroad Company with the Warehouse Company for account of the owners thereof, nor upon bulk freight, nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material or supplies belonging to the Railroad Company; provided, however, that the Railroad Company shall have the right to cancel or abrogate this agreement and/or the payment of allowances provided for in this [fol. 685] paragraph in the event such action is authorized, permitted or required by any order, decision or law hereafter made, rendered or enacted by any State or Federal tribunal of competent jurisdiction, or in the event that these payments of allowances are held by any such tribunal to create undue preference or undue prejudice, upon such notice to the Warehouse Company in writing of its intention so to do as may be necessary to enable the Railroad Company to comply with such order, decision or law; and also provided that the Railroad Company shall have the right

to cancel or abrogate at any time after sixty days' notice to the Warehouse Company in writing of its intention so to do the payments of allowances provided for in this paragraph, if it shall decide to cancel similar payments of allowances now or hereafter in effect with respect to other warehouses in seaboard cities on its System.

Second. The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's System, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines, it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load, unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

[fol. 686] (d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freight in the custody or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as it holds the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouse, to be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouse in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its freight stations before delivery without charge to the consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with the Warehouse Company by the Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the purpose of realizing its charges thereon.

Fourth. It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well to involun-
[fol. 687] tary assignments, and that upon the happening of any legal proceeding the effect of which shall be to divest the title or possession of the said Warehouse Company,

this agreement shall, at the option of the Railroad Company, cease and determine; provided, however, that nothing contained in this Paragraph Fourth shall be construed to prevent the assignment of the income and revenues to the Merchants' Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth. This agreement shall take effect as of the first day of September, A. D. 1927, and shall continue in full force and effect until the first day of February, A. D. 1937; provided, however, that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days' written notice to the Warehouse Company, cease and determine and become absolutely void.

Sixth. This agreement shall be construed to be applicably only to the warehouse situated on the plot of land bounded by Delaware Avenue, Kenilworth Street, Penn Street and Bainbridge Street, as aforesaid, and in no wise or manner as impairing or affecting the terms and conditions of any other contract between the parties hereto in connection with any other premises. In the event of any arbitration being demanded and held under the provisions of any other agreement now existing between the parties, this agreement shall not be received or read in evidence before the arbitrators for any purpose whatsoever.

Seventh. This agreement and all its provisions shall be binding upon and enure to the benefit of the successors and assigns of each of the parties hereto.

In witness whereof, the said parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year first above written.

[fol. 688] The Pennsylvania Railroad Company, by [Name illegible], Vice-President. Attest: Lewis Neilson, Secretary. Merchants' Warehouse Company, by Harvey C. Miller, President. Attest: S. Townsend Zook, Secretary.

Signed, sealed and delivered in the presence of [Names illegible].

[fol. 689] [Endorsed:] James Gallagher, et al. vs. The P. R. R. Co. I. C. C. Docket No. 20968. Exhibit No. —. Witness: —— ——. Agreement between The Pennsylvania Railroad Company and Merchants' Warehouse Company, dated 28th July, 1927, providing for the handling and storage of flour and grain and other merchandise at the warehouse of the Warehouse Company located at Delaware Avenue, Kenilworth, Penn and Bainbridge Streets, Philadelphia, Pa. From 1st September, 1927 to 1st February, 1937. Bond in the sum of $2,000, with Indemnity Insurance Company of North America, surety, attached. The Pennsylvania Railroad Company, C-5239.

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(4)

[fols. 690-694] Know all men by these presents, That the Merchants Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, (hereinafter called the Warehouse Company), as Principal, and The Guarantee Company of North America, a corporation organized and existing under the laws of the Dominion of Canada, (hereinafter called the Surety), as Surety, are held and firmly bound unto The Pennsylvania Railroad Company (hereinafter called the Railroad Company) in the sum of Two Thousand ($2,000.00) Dollars, lawful money of the United States of America, to be paid to the said The Pennsylvania Railroad Company, its certain attorneys, successors or assigns, to which payment, well and truly to be made, the said Principal and the said Surety do bind themselves and each of them, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with their seals and dated the first day of March A. D. 1926.

Whereas, the above named Warehouse Company has entered into a certain agreement with the said Railroad Company bearing date the 10th day of April 1922, (a copy of which agreement is hereto attached and made a part hereof as fully and with the same effect as if herein fully set forth) with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said

Warehouse Company, situated at the Northeast Corner of Front and Bainbridge Streets in the City of Philadelphia, State of Pennsylvania.

And whereas, it is in said agreement provided in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties and in such amount as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants thereunder.

Now the condition of this obligation is such, that if the above bounden Warehouse Company shall and do make prompt payment of the said freight and other charges in said agreement called for, and shall and do perform all its other covenants and each and every covenant in said agreement provided for by it to be performed according to the true intent, purpose and meaning of the said agreement, then this obligation is to be void; otherwise to be and remain in full force and virtue.

Provided, however, that the Surety may for reasonable cause, withdraw as Surety upon this bond by giving thirty (30) days written notice to the said Railroad Company at its General Office in the City of Philadelphia, Pa. of such cause and of its intention so to withdraw; and the said Surety shall not be responsible for any act or default of the said Principal occurring after the expiration of the said Thirty (30) days.

Merchants Warehouse Company, by Harvey C. Miller, President. Attest: S. Townsend Zook, Secretary. The Guarantee Company of North America, William H. Jackson, Attorney-in-Fact; Edward H. De Baeck, Attorney-in-Fact.

Signed, Sealed and Delivered in the presence of D. E. Young, Witness as to Surety.

[fol. 695] (Copy)

This agreement made this tenth day of April in the year of our Lord one thousand nine hundred and twenty-two

(A. D. 1922) between the Pennsylvania Railroad Company, hereinafter called the "Railroad Company," party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the "Warehouse Company," party of the second part;

Whereas, the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company situated at the northeast corner of Front and Bainbridge Streets, in the City of Philadelphia, and State of Pennsylvania;

Now, therefore, this agreement witnesseth:

First, That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouse, and to promptly do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouse the amount following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and thirty-five cents (35¢) per ton (of 2000 pounds) for each ton of merchandise, provided, however, that no payment shall be made by the Railroad Company for freight, which, upon arrival at its destination, is or has been unclaimed or refused by the consignees and has been stored with the Warehouse Company for account of the owners thereof, nor upon bulk freight, nor upon freight the movement of which by the Railroad Company has been

performed at a switching rate, nor upon material and supplies belonging to the Railroad Company.

[fol. 696] Second: The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's System, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

(d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freight in the custody or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so

long as it holds the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of, the said Warehouse Company, in respect to merchandise received by it at said warehouse, to be forwarded over the Railroad Company's lines or to be delivered to consignees, and also [fol. 697] from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouse in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its freight stations before delivery without charge to the consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignees, or party entitled to receive the same, or which shall not be direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the purpose of realizing its charges thereon.

Fourth. It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceeding the effect of which shall be to divest the title of possession of the said Warehouse Company, this agreement, shall, at the option of the Railroad Company, cease and determine: Provided, however, that nothing contained

in this paragraph Fourth shall be construed to prevent the assignment of the income and revenues to the Merchants' Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth. This agreement shall take effect as of the seventeenth day of June, A. D. 1922, and shall continue in full force and effect for the term of three (3) years from said date, and thereafter from year to year unless and until terminated at the end of said period of three years or at the end of any one year thereafter by either of the said parties hereto giving six (6) months previous written notice to the other of its intention so to do; Provided, however, that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days' written [fol. 698] notice to the Warehouse Company, cease and determine and become absolutely void.

Sixth. This agreement shall be construed to be only applicable to the warehouse situate at the northeast corner of Front and Bainbridge Streets, as aforesaid, and in no wise or manner as impairing or affecting the terms and conditions of any other contract between the parties hereto in connection with any other premises. In the event of any arbitration being demanded and held under the provisions of any other agreement now existing between the parties, this agreement shall not be received or read in evidence before and arbitrators for any purpose whatsoever.

Seventh. This agreement and all its provisions shall be binding upon and enure to the benefit of the successors and assigns of each of the parties hereto.

In witness whereof the said parties hereto have hereto affixed their respective corporate seals, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by —— ——, Vice-President. Attest: —— ——, Secretary.
Merchants' Warehouse Company, by —— ——, President. Attest: —— ——, Secretary.

Signed, sealed and delivered in the presence of: —— ——.

[fol. 699] This agreement made this tenth day of April in the year of our Lord one thousand nine hundred and twenty-two (A. D. 1922) between the Pennsylvania Railroad Company, hereinafter called the "Railroad Company," party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the "Warehouse Company," party of the second part:

Whereas, the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company situated at the northeast corner of Front and Bainbridge Streets, in the City of Philadelphia, and State of Pennsylvania;

Now, therefore, this agreement witnesseth:

First. That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouse, and to promptly do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouse the amount following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and thirty-five cents (35¢) per ton (of 2,000 pounds) for each ton of merchandise, provided, however, that no payment shall be made by the Railroad Company for freight, which, upon arrival at its destination, is or has been unclaimed or refused by the consignee and has been stored with the Warehouse Company for account of the owners thereof, nor upon bulk freight, nor upon freight the

movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company.

[fol. 700] Second: The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's System, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being understood that without the consent of the Railroad Company the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time, elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount, as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

(d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freight in the custody or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as it holds the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company [fol. 701] from and against all manner — be forwarded over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouse in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its freight stations before delivery without charge to the consignees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the purpose of realizing its charges thereon.

Fourth. It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceedings the effect of which shall be to divest the title or possession of the said Warehouse Company, this agreement, shall, at the option of the Railroad Company, cease and determine; Provided, however, that nothing contained in this paragraph Fourth shall be construed to prevent the

assigning of the income and revenues to the Merchants' Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth. This agreement shall take effect as of the seventeenth day of June, A. D. 1922, and shall continue in full force and effect for the term of three (3) years from said date, and thereafter from year to year unless and until terminated at the end of said period of three years or at the end of any one year thereafter by either of the said parties hereto giving six (6) months previous written notice to the other of its intention so to do: Provided, however, [fol. 702] that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days' written notice to the Warehouse Company, cease and determine and become absolutely void.

Sixth. This agreement shall be construed to be only applicable to the warehouse situate at the northeast corner of Front and Bainbridge Streets, as aforesaid, and in no wise or manner as impairing or affecting the terms and conditions of any other contract between the parties hereto in connection with any other premises. In the event of any arbitration being demanded and held under the provisions of any other agreement now existing between the parties, this agreement shall not be received or read in evidence before the arbitrators for any purpose whatsoever.

Seventh. This agreement and all its provisions shall be binding upon and enure to the benefit of the successors and assigns of each of the parties hereto.

In witness whereof the said parties hereto have hereunto affixed their respective corporate seals, duly attested, the day and year first above written.

The Pennsylvania Railroad Company, by Geo. D. D. Moy, Vice-President. Attest: —— E. Wilson, Secretary. Merchants' Warehouse Company, by Harvey C. Mills, President. Attest: S. Townsend Zoos, Secretary.

Signed, sealed and delivered in the presence of George M. Richardson, Luowden Henry.

[fols. 703-708] [Endorsed:] James Gallagher et al. vs. The P. R. R. Co. I. C. C. Docket No. 20968. Exhibit No. —. Witness: ——. Document must be returned to the Office of the Secretary, Broad Street Station, Philadelphia. A4730. Agreement between The Pennsylvania Railroad Company and Merchants' Warehouse Company, Dated 10th April 1922; Providing for the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company at the northeast corner of Front and Bainbridge streets, Philadelphia, Pa., for 3 years from 17th April, 1922 and thereafter from year to year until terminated on six months' notice. Bond in the sum of $2,000. With The Guarantee Company of North America, surety, attached. The Pennsylvania Railroad Company. C-3333.

[fol. 709] This agreement made this 4th day of March in the year of our Lord one thousand nine hundred and twenty-five (A. D. 1925) between The Pennsylvania Railroad Company, hereinafter called the "Railroad Company," party of the first part, and the Merchants' Warehouse Company, a corporation organized and existing under the laws of the State of Pennsylvania, hereinafter called the "Warehouse Company", party of the second part;

Whereas, the parties hereto desire to enter into an agreement with respect to the handling and storage of flour, grain and other merchandise at the warehouse of the said Warehouse Company, designated as Kenilworth Stores, situated at Bainbridge, Front, Kenilworth and Penn Streets, in the City of Philadelphia, and State of Pennsylvania;

Now, therefore, this agreement witnesseth:

First. That the Railroad Company covenants and agrees:

(a) To maintain railroad tracks adjacent to the Warehouse Company's said warehouse and to promptly do the necessary shifting to enable its cars to reach the warehouse aforesaid for the purpose of taking from and delivering to

the same all freight to be shipped therefrom or destined thereto and shall and will take and deliver the same over its lines, at non-discriminatory rates, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Philadelphia.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouse the amount following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and thirty-five cents (35¢) per ton (of 2,000 pounds) for each ton of merchandise, provided, however, that no payment shall be made by the Railroad Company for freight, which, upon arrival at its destination, is or has been unclaimed or refused by the consignee and has been stored with the Warehouse Company for account of the owners thereof, nor upon bulk freight, nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company.

Second. The Warehouse Company covenants and agrees:

(a) To at all times accord to traffic passing over the lines of the Pennsylvania Railroad Company's System, of which the railroads of the Railroad Company form part, preference in the facilities furnished by the Warehouse Company over traffic passing over other lines; it being understood that without the consent of the Railroad Com- [fol. 710] pany the said facilities shall not be extended to traffic passing over other lines.

(b) To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees, and in the case of incoming freight to promptly notify *and* the consignees of the arrival thereof.

(c) To be responsible to the Railroad Company for the prompt collection of all freight and other charges upon

inbound freight, payment to be made by the Warehouse Company to the Railroad Company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the Railroad Company may, from time to time elect to collect direct from any consignee; and in order to secure the Railroad Company, the Warehouse Company shall furnish to it a bond with such good and sufficient sureties, and in such amount as shall be approved by the Railroad Company, conditioned for the prompt payment of the said freight and other charges and for the performance by the Warehouse Company of all its other covenants hereunder.

(d) To indemnify and hold harmless the Railroad Company for all damage to, or loss of, freight in the custody or control of the Warehouse Company, and all liability by reason thereof, and to keep an adequate and sufficient line of fire insurance on all such freight to cover the liability of the Railroad Company therefor.

(e) To promptly notify the Railroad Company in writing of the failure of any consignee to remove freight, and, so long as it hold the said freight for account of the Railroad Company, to observe and comply with all directions with respect to such freight which may be received by it from the Railroad Company.

(f) To protect and indemnify the Railroad Company from and against all manner of liability on account of any acts of omission or commission on the part of it, the said Warehouse Company, in respect to merchandise received by it at said warehouse, to be forward- over the Railroad Company's lines or to be delivered to consignees, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(g) To keep its said warehouse in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received by it.

[fol. 711] Third. It is hereby mutually agreed that at the expiration of the period during which the Railroad Company shall currently allow freight to remain at its freight stations before delivery without charges to the con-

signees, freight delivered by the Railroad Company to the Warehouse Company which has not been delivered to the consignee, or party entitled to receive the same, or which shall not by direction of said Railroad Company have been returned to the shipper thereof, or otherwise disposed of, shall be regarded and treated as stored with Warehouse Company by Railroad Company for account of the owners thereof, and thereupon the Warehouse Company shall be entitled to deal with the property and to make such charges for its custody as it may lawfully and properly do, and shall be further entitled to dispose of the same in such manner, and at such times, as it may lawfully and properly do for the purpose of realizing its charges thereon.

Fourth. It is further agreed that no assignment of this agreement shall be valid without the consent of the Railroad Company, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceedings the effect of which shall be to divest the title or possession of the said Warehouse Company, this agreement, shall, at the option of the Railroad Company, cease and determine; Provided, however, that nothing contained in this paragraph Fourth shall be construed to prevent the assigning of the income and revenues to the Merchants' Warehouse Company from this agreement as additional security for mortgage bonds to be issued by the said Warehouse Company.

Fifth. This agreement shall take effect as of the — day of —— (A. D.), and shall continue in full force and effect for the term of three (3) years from said date, and thereafter from year to year unless and until terminated at the end of said period of three years or at the end of any one year thereafter by either of the said parties hereto giving six (6) months previous written notice to the other of its intention so to do: Provided, however, that should the Warehouse Company in any respect violate or fail to comply with any of the conditions and covenants herein contained, then this agreement shall, at the option of the Railroad Company, on thirty (30) days written notice to the Warehouse Company, cease and determine and become absolutely void.